179

No. 10-884

Supreme Court, U.S.
FILED
JAN 4 - 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SAMUEL SCOTT,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

DONALD H. FLANARY III.*
GOLDSTEIN, GOLDSTEIN & HILLEY
310 South St. Mary's Street,
Suite 2900
San Antonio, Texas 78205
210-226-1463
210-226-8367 facsimile
donflanary@hotmail.com

CHAD P. VAN BRUNT,
Attorney and Counselor

**Attorney of Record*
Representing Samuel Scott

COCKLE LAW BRIEF PRINTING CO (800) 225 6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Texas harassment statute criminalizes intentionally making "repeated" telephone communications or "repeated" "electronic communications" in a "manner reasonably likely to harass, annoy, alarm, abuse, torment embarrass, or offend" that do actually "harass, annoy, alarm, abuse, torment, embarrass, or offend" another person. The statute defines "electronic communications" as "a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system" and includes "a communication initiated by electronic mail, instant message, network call, or facsimile machine" and "a communication made to a pager." The statute does not define the meaning of "harass," "annoy," "alarm," "abuse," "torment," "embarrass," "offend" or "repeated." Virtually every other state in the union has a similar harassment statute. The question presented is:

(1.) Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad.

(2.) Whether the Texas harassment statute violates the First Amendment because it is a content-based restriction on speech and expressive conduct.

(3.) Whether private argumentative speech should be a protected class of speech.

(4.) Whether the First Amendment requires an analysis of the distinctions between open-air, face-to-face communication and electronic communication.

PARTIES TO THE PROCEEDING

Petitioner:

Samuel Scott

Attorney for Petitioner, on Discretionary Review, Appeal and at Trial:

Donald H. Flanary, III.
GOLDSTEIN, GOLDSTEIN & HILLEY
310 South St. Mary's Street, Suite 2900
San Antonio, Texas 78205
210-226-1463

Respondent:

State of Texas

Attorney for Respondent, State of Texas, at Trial:

Carlos Solis
Assistant Criminal District Attorney
Bexar County Justice Center
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

Attorneys for Respondent, State of Texas, on Appeal:

Kevin Patrick Yeary
Helen Petry
Assistant Criminal District Attorneys
Bexar County Justice Center
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

PARTIES TO THE PROCEEDING – Continued

Attorney for Respondent, State of Texas, on Discretionary Review:

Kevin Patrick Yeary
Assistant Criminal District Attorney
Bexar County Justice Center
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vii
PETITION FOR WRIT OF CERTIORARI	1
REFERENCE TO OPINION IN THE CASE	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THE PETITION	4
Harassment Statute is Unconstitutionally Vague and Overbroad	6
The Statutory Terms "Annoy," "Alarm," "Abuse," "Torment," and "Embarrass" are Inherently Unconstitutionally Vague	11
The Statutory Term "Repeated" Communications is Unconstitutionally Vague	15
Harassment Statute Implicates the Freedom of Expression Protections of the First and Fourteenth Amendments	16
Harassment Statute is Overbroad	19
Political Speech and Freedom of the Press	20
Content-Based Restrictions on Speech and Expressive Conduct	23

TABLE OF CONTENTS – Continued

Page

Private Argumentative Speech 27

Distinctions between Electronic and Face-to-Face Communications 28

CONCLUSION..... 30

APPENDIX:

Opinion of the Texas Court of Criminal Appeals in *Scott v. State*, 322 S.W.3d 662 (Tex.Crim.App. 2010).....App. 1

Opinion of the Texas Fourth Court of Appeals in *Scott v. State*, 298 S.W.3d 264 (Tex. App. – San Antonio 2009, *pet. granted*).....App. 35

Texas Penal Code section 42.07 .....App. 54

Motion to Dismiss in *State v. Scott*, Cause Number 963428 in Bexar County Court at Law Number 7 .....App. 57

Motion to Quash in *State v. Scott*, Cause Number 963428 in Bexar County Court at Law Number 7.....App. 64

Motion to Dismiss in *State v. Scott*, Cause Number 972642 in Bexar County Court at Law Number 7 .....App. 76

Motion to Quash in *State v. Scott*, Cause Number 972642 in Bexar County Court at Law Number 7.....App. 83

Information in *State v. Scott*, Cause Number 963428 in Bexar County Court at Law Number 7 .....App. 95

TABLE OF CONTENTS – Continued

Page

Information in *State v. Scott*, Cause Number 972642 in Bexar County Court at Law Number 7 ..... App. 96

Appellant's Brief on Discretionary Review in the Texas Court of Criminal Appeals in *Scott v. State*, 322 S.W.3d 662 (Tex.Crim.App. 2010) ..... App. 97

Companion Harassment Statutes in Other Jurisdictions ..... App. 148

TABLE OF AUTHORITIES

Page

CASES:

American Communications Ass'n, C.I.O. v. Douds, 399 U.S. 382 (1950) 26

Ashton v. Kentucky, 384 U.S. 195 (1966) 10

Baggett v. Bullitt, 377 U.S. 360 (1964) 10

Benefit v. Cambridge, 424 Mass. 918, 679 N.E.2d 184 (1997) 25

Brandenburg v. Ohio, 395 U.S. 444 (1969) 25

Bridges v. State of California, 314 U.S. 252 (1941) 16

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 19

Carey v. Brown, 447 U.S. 455 (1980) 27

City of Chicago v. Morales, 527 U.S. 41 (1999) 19

City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 20

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 10, 11

Connally v. General Constr. Co., 269 U.S. 385 (1926) 6, 9, 11

Connick v. Myers, 461 U.S. 138 (1983) 17

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 17

Gooding v. Wilson, 405 U.S. 518 (1972) 9, 10, 11, 19

Grayned v. City of Rockford, 408 U.S. 104 (1972) 7, 8, 9, 10, 11

TABLE OF AUTHORITIES – Continued

Page

Griswold v. Connecticut, 381 U.S. 479 (1965) 17

Hess v. Indiana, 414 U.S. 105 (1973).....25

Hill v. Colorado, 530 U.S. 703 (2000) 17

Hynes v. Mayor & Council of Borough of Oradell, 425 U.S. 610 (1976) 10, 11

Jones v. State, 742 S.W.2d 398 (Tex.Crim.App. 1987).....8

Karenev v. State, 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008, *pet. granted* Aug. 20, 2008).....16

Kinglsey Intern. Pictures Corp. v. Regents of University of State of N.Y., 360 U.S. 684 (1959).....25

Kramer v. Price, 712 F.2d 176 (5th Cir. 1983) ...*passim*

Lanzetta v. State of New Jersey, 306 U.S. 451 (1939).....6, 10, 11

Long v. State, 931 S.W.2d 285 (Tex.Crim.App. 1996).....7, 8, 9, 14, 18

May v. State, 765 S.W.2d 438 (Tex.Crim.App. 1989).....14, 19

Mills v. Alabama, 384 U.S. 214 (1966) 17

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).....17

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) 20

R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).....25

TABLE OF AUTHORITIES – Continued

Page

Rhode Island v. Innis, 446 U.S. 291 (1980) 8

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 17

Schenck v. United States, 249 U.S. 47 (1919) 25

Scull v. Commonwealth of Virginia, 359 U.S. 344 (1959) 10

Smith v. Goguen, 415 U.S. 566 (1974) 10, 11

Stanley v. Georgia, 394 U.S. 557 (1969) 17

Thomas v. Collins, 323 U.S. 516 (1945) 23

Thornhill v. Alabama, 310 U.S. 88 (1940) 10

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 24

Village of Hoffman Estates, et al. v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 19

Watts v. U.S., 394 U.S. 705 (1969) 18, 26

CONSTITUTION

U.S. Const., amend. I .....*passim*

U.S. Const., amend. XIV 2, 6, 9, 16

TEXAS CONSTITUTION

Texas Const., article 1 section 8 6

Texas Const., article 1 section 10 6

Texas Const., article 1 section 19 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND TREATISES

28 U.S.C. section 1257(a) 1

Texas Penal Code section 42.07 ..... *passim*

MISCELLANEOUS

House Comm. On Criminal Jurisprudence, Committee Report, Tex. S.B. 139, 77th Leg., R.S. (2001) 18, 26

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

REFERENCE TO OPINION IN THE CASE

The opinion of the Texas Court of Criminal Appeals, published, *Scott v. State*, 322 S.W.3d 662 (Tex.Crim.App. 2010) at page 1 of the appendix hereto.

JURISDICTION

The date on which the highest state court decided Petitioner's case was October 6, 2010. A copy of that decision appears at page 1 of the appendix hereto. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

> petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 25, 2008, the Petitioner was convicted in Bexar County Court at Law Number Seven, Bexar County, Texas of two separate charges of harassment. On that day, a hearing was held on his motions to dismiss and quash the two charging instruments in both cases. *See* Appendix at pages 57, 64, 76, and 83. The court denied these motions and he entered a conditional plea to the offenses, reserving his right to appeal the denial of these timely filed motions. RR-M14-15,[1]

[1] "RR-M" refers to the Reporter's Record of the "Motion to Quash the Information, Motion to Dismiss" hearing held on June 25, 2008, which is followed by the corresponding page number in the record

RR-P8.[2] The Petitioner appealed to the intermediate court of appeals and in a published opinion, of June 24, 2009, the Fourth Court of Appeals District of Texas, San Antonio, reversed and rendered a judgment of acquittal and held that the two charged sections of the Texas harassment statute implicated the First Amendment and were unconstitutionally vague. *See* Appendix at page 35. Thereafter, the Bexar County District Attorney's Office petitioned for and was granted discretionary review by the Texas Court of Criminal Appeals. In a published opinion, of October 6, 2010, the Texas Court of Criminal Appeals reversed the judgments of the court of appeals and affirmed the judgments of the trial court. *See* Appendix at page 1.

STATEMENT OF THE FACTS

On June 25, 2008, the Petitioner was convicted on two charges of harassment in violation of Texas Penal Code section 42.07 RR-P8. *See* Appendix at page 54. In cause number 963428, Petitioner was accused of making repeated phone calls to his ex-wife on December 5, 2006 that offended her. RR-P3. *See* Appendix at page 95. In cause number 972642, Petitioner was accused by his ex-wife of making repeated

[2] "RR-P" refers to the Reporter's Record of the "Plea Before the Court," which is followed by the corresponding page number in the record

telephone calls to her late at night and leaving abusive and harassing voice-mail messages for her on March 12, 2008. RR-P3. *See* Appendix at page 96.

REASONS FOR GRANTING THE PETITION

This case warrants review by this Honorable Court for a variety of important reasons. First, the law here is unsettled. There is a lack of guidance from this Court addressing these important First Amendment issues in this new and ever evolving world of electronic media. The statute is also a content-based restriction on speech and expressive conduct because it qualitatively regulates the type of communication that can legally be undertaken. This statute is particularly troublesome because it attempts to regulate speech communicated through the use of electronic technology that would otherwise be permitted. The statute is so overbroad that it snares all forms of speech including political, religious and commercial that are transmitted between citizens with differing opinions. It criminalizes otherwise free and important speech solely because it is sent through a wire, email, text, or posted on a social media website. The statute prohibits private arguments between citizens. Otherwise legal and protected speech can now be criminalized simply by being transmitted electronically. The statute is so broad that it also prohibits speech on radio, television, and at public events where microphones or bullhorns are used. The statute criminalizes all forms of political

dissent on the Internet conditioned upon a random reader being offended or even annoyed. Even the terms used to describe the offended party's state of mind, after hearing the speech, are inherently vague. This and the host of other harassment statutes nationwide have created a need to address whether there exists a First Amendment right to engage in private argumentative discourse between citizens without government intrusion. The genesis of all public debate and discourse begins in thought, it then develops in private conversations and argument, and finally blooms on the public square. To quash any portion of the growth of ideas or discourse over putative annoyance or offense is to limit free speech in violation of the First Amendment. With its ruling, the Texas Court of Criminal Appeals has inadvertently drawn dangerous and unwarranted distinctions between open-air or face-to-face communications and electronic communications. It now becomes vital for this Court to provide guidance to the States concerning how to regulate electronic communication. The issues before the Court are particularly appropriate because the questions presented are in a state of evolving definition and uncertainty. The Texas harassment statute that is challenged by the Petitioner is not unlike virtually every other harassment statute throughout the fifty states. *See* Appendix at page 148.

Secondly, the Texas Court of Criminal Appeals erred when it ruled that the Texas harassment statute does not implicate the freedom of expression and due process protections of the United States

Constitution. This statute lacks the necessary specificity to avoid being unconstitutionally vague in violation of due process. Furthermore, because the behavior prohibited by this statute involves communication, it inevitably has freedom of speech implications. Likewise, the vague language of the statute and the medium of communication that it regulates results in overbreadth. This ruling is also in conflict with a prior ruling by the Fifth Circuit dealing with the same statutory terms in an earlier version of the harassment statute. *Kramer v. Price,* 712 F.2d 176 (5th Cir. 1983). The revised version of the harassment statute that is before the Court today fails for the same reasons that the Fifth Circuit overruled the prior version.

For these reasons, this Court's guidance is necessary.

Harassment Statute is Unconstitutionally Vague and Overbroad

The Petitioner was convicted on two charges of the offense of harassment in violation of Texas Penal Code section 42.07. This statute is unconstitutionally void for vagueness and overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1 sections Eight, Ten & Nineteen of the Texas Constitution. *Connally v. General Constr. Co.,* 269 U.S. 385 (1926), *Lanzetta v. State of New Jersey,* 306 U.S. 451 (1939),

and *Long v. State,* 931 S.W.2d 285 (Tex.Crim.App. 1996).

The harassment statute is unconstitutionally vague because "a person of ordinary circumstances cannot tell what is prohibited and what is not" and the statute does not "establish determinate guidelines for law enforcement." *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972); *see also Long v. State,* 931 S.W.2d 285 (Tex.Crim.App. 1996). The Court of Criminal Appeals in *Long* [in holding that the terms "annoy" or "alarm" were unconstitutionally vague] stated:

> It is well-established that criminal laws must be sufficiently clear in at least three respects. First, *a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited.* Second, *the law must establish determinate guidelines for law enforcement.* Finally, where First Amendment freedoms are implicated, *the law must be sufficiently definite to avoid chilling protected expression.* "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness 'demands a greater degree of specificity than in other contexts.'" Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Moreover, when a vagueness challenge involves First Amendment considerations, a criminal law

> may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct.

Id. [*emphasis added*].

The Texas harassment statute, as enacted, does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. It is impossible for a citizen to know what, in the disjunctive, is meant by this statute's series of vague terms. These terms are susceptible to uncertainties of meaning, and because the statute does not establish clear standards for whose sensibilities are to be offended, it is unconstitutionally vague. Nor does the statute define the term "repeated" or indicate the requisite frequency of "repeated communications." *See Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972).

Long also held that the phrase "reasonably likely" does not constitute an objective or "reasonable man" standard. The language "reasonably likely" is a "far cry from a reasonable person standard." *Long v. State,* 931 S.W.2d 285, 289 (Tex.Crim.App. 1996). To constitute an objective standard, the phrase "reasonably likely" must be coupled with words such as "should have known." *See Rhode Island v. Innis*, 446 U.S. 291, 302 (1980); *Jones v. State*, 742 S.W.2d 398, 407 (Tex.Crim.App. 1987). The statute begs the question of whose sensitivities it protects. It is "reasonably likely" that a person of uncommon sensitivity will be "alarmed" or "annoyed" by many phone calls. In the circumstance where an abnormally sensitive person is alarmed or harassed by communication, is the statute violated? This Texas Court of Criminal

Appeals held, "At most, the words 'reasonably likely' plainly import a minimal causality requirement." *Long*, 931 S.W.2d at 289.

The Texas harassment statute, as enacted, does not establish determinate guidelines for law enforcement. It is impossible for law enforcement to know what standards are to be followed or to recognize whose sensibilities are to be offended by the statute's series of vague terms. Nor does law enforcement have any guidance related to the term "repeated" or direction to requisite frequency of "repeated communications." *See Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972).

The Texas harassment statute, as enacted, chills protected expression because the statute is not sufficiently definite. The statute uses a series of subjective terms in the disjunctive in varying degrees of severity. The statute does not define its series of vague terms nor does it define the term "repeated" or indicate the requisite frequency of "repeated communications." *See Gooding v. Wilson,* 405 U.S. 518 (1972). An enactment is void for vagueness under the due process clause of the Fourteenth Amendment if it fails to draw reasonably clear lines between lawful and unlawful. *Kramer v. Price,* 712 F.2d 176 (5th Cir. 1983). A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926). Statutes and regulations must be reasonably certain to avoid vagueness that might otherwise induce

individuals to forgo First Amendment rights for fear of violating an unclear law. *See Scull v. Commonwealth of Virginia,* 359 U.S. 344, 353 (1959). Therefore, a law must be narrowly drawn when First Amendment rights are implicated to prevent the undue constraint of such rights under the guise of regulating conduct by police power. *See Ashton v. Kentucky,* 384 U.S. 195, 200-01 (1966). Otherwise, there is the risk that a vague law will cause individuals to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall,* 357 U.S. 513, 526 (1958)).

The First Amendment protects people from vague penal statutes. *See Lanzetta v. State of New Jersey,* 306 U.S. 451 (1939), *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972), *Hynes v. Mayor & Council of Borough of Oradell,* 425 U.S. 610 (1976), *Smith v. Goguen,* 415 U.S. 566 (1974), *Gooding v. Wilson,* 405 U.S. 518 (1972), *Coates v. City of Cincinnati,* 402 U.S. 611 (1971), and *Thornhill v. Alabama,* 310 U.S. 88 (1940). The statutes considered in each of these cases were unconstitutional because vague terms encompassed not only the impermissible conduct, but also constitutionally-protected conduct, such as free speech and free association. Thus, it chills the exercise of those freedoms and lends itself "to harsh and discriminatory enforcement by local prosecuting officials." *Thornhill,* 310 U.S. at 97-98; *see also Coates,* 402 U.S. at 615 (concerning free assembly);

Gooding, 405 U.S. at 519-20 (involving criminal liability for using abusive language); *Smith v. Goguen*, 415 U.S. at 571-72 (penalizing flag misuse); *Hynes*, 425 U.S. at 611, 620 (preventing door-to-door solicitation); *Grayned*, 408 U.S. at 108 (holding that anti-noise ordinance was not overly vague); *Lanzetta*, 306 U.S. at 458 (criminalizing being a "gangster"); *Connally*, 269 U.S. at 393 (penalizing for not paying certain wage rates).

The Statutory Terms "Annoy," "Alarm," "Abuse," "Torment," and "Embarrass" are Inherently Unconstitutionally Vague

The harassment statute's prohibition on intending to "harass, annoy, alarm, abuse, torment, or embarrass another" by making communications "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another" is unconstitutionally vague because these terms are inherently vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972), *Gooding v. Wilson*, 405 U.S. 518 (1972), *Coates v. Cincinnati*, 402 U.S. 611 (1971) and *Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983). The Texas Penal Code section 42.07 states:

> **(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:**
>
> (1) initiates communication by telephone, in writing, or by electronic communication and in the course of the

communication makes a comment, request, suggestion, or proposal that is obscene;

(2) threatens, by telephone, in writing, or by electronic communication, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of his family or household, or his property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or *in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another*;

(5) makes a telephone call and intentionally fails to hang up or disengage the connection;

(6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section; or

(7) sends repeated electronic communications *in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.*

Furthermore, the statute does not define an objective standard in which to measure to what level of annoyance or alarm is prohibited. A person, in exercising their First Amendment rights to free speech, has no way of knowing objectively what type of conduct is annoying or alarming by reading this statute. Does a big brother violate the statute when he "annoys" his little sister? Does a student violate the statute when he annoys his teacher? Whether in person, on the telephone, or through an email, the content of the speech can be the same, but the guidance from the statute is still so vague as to not be answered. What kind of words annoy when we answer the telephone? Does it have to be obscene or vulgar? Does the relationship between the caller and the complainant matter? These questions cannot be answered by a person of ordinary intelligence or law enforcement because the statute is too vague to answer them. A citizen is left to guess at their meaning and thus his protected expression is chilled.

In *Kramer*, the Fifth Circuit held that the words "annoy" and "alarm" in the context of the old version of the Texas harassment statute were inherently vague and that Texas courts had not construed the terms to lessen their vagueness. *Kramer v. Price*, 712 F.2d 174, 177 (5th Cir. 1983). The Fifth Circuit has also criticized this statute's pre-1983 predecessor for failing to specify whose sensitivities are "offended." *Id.* The court explains that vagueness is not lessened by making the conduct depend upon each complainant's sensitivity. *Id.* at 178. In the 1983 version of the

statute, which was held unconstitutional by the *Kramer* court,

> (a) A person commits an offense if he intentionally:
>
> (1) communicates by telephone or in writing in vulgar, profane, obscene, or indecent language or in a coarse and offensive manner and by this actions intentionally, knowingly, or recklessly annoys or alarms the recipient.

Id. at 176.

The Court of Criminal Appeals in *May* has also found that this pre-1983 harassment statute was unconstitutionally vague and indefinite in that there was no objective standard to measure the level of annoyance or alarm prohibited. *See May v. State*, 765 S.W.2d 438 (Tex.Crim.App. 1989). The Court stated that "the inherent vagueness of the statute as it then existed, in attempting to define what annoys and alarms people and its failure to specify whose sensitivities are relevant, causes it to be unconstitutionally vague." *Id* at 440.

The legislature in 1993 attempted to correct the deficiencies of the pre-1983 statute that was held unconstitutional by *Kramer* and *May*. However, the Court of Criminal Appeals in *Long* soon found the same constitutional inadequacies in the new statute as before and ruled that the terms "annoy" or "alarm" were still unconstitutionally vague. *Long v. State* 931 S.W.2d 289 (Tex.Crim.App. 1996).

The current version of the harassment statute still does not pass constitutional muster. This current statute, for which the Petitioner was convicted, is still unconstitutionally void for vagueness. This time, the statute has employed, in the disjunctive, a series of vague terms that are themselves susceptible to uncertainties of meaning, and because the statute does not establish clear standards for whose sensibilities have to be offended, it is unconstitutionally vague in that the standard of conduct it specifies is dependent on each complainant's sensitivity, and the statute does not define the term "repeated" nor does it indicate the requisite frequency of "repeated communications."

The Statutory Term "Repeated" Communications is Unconstitutionally Vague

The harassment statute's prohibition on "repeated" telephone or electronic communications is unconstitutionally vague because the statute does not define how many communications are prohibited or the period of time over which such communications are not to occur.

In a prior similar case holding that Texas Penal Code section 42.07 was unconstitutionally vague, the one intermediate Texas court of appeals noted that

> although the statute [TPC section 42.07] requires "repeated" electronic communications, it does not define the term *repeated,* nor does it indicate the requisite frequency of the

> repeated communications. The *Random House Webster's Unabridged Dictionary* defines *repeated* as "done, made, or said again and again." *See* Random House Webster's Unabridged Dictionary 1633 (2d ed. 1999). *Again and again* indicates at least three acts. Does this mean that if a person sends three annoying emails over a five-year period, the person is guilty of the offense of harassment? Can we tell from the statute? The jury charge in this case does nothing to clarify the term because the application paragraph required that the jury find that Appellant sent email, not repeated email, and nowhere in the charge is the term *repeated* defined.

Karenev v. State, 258 S.W.3d 210, 217-18 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009).

Harassment Statute Implicates the Freedom of Expression Protections of the First and Fourteenth Amendments

The qualified prohibitions laid down by the framers of the First Amendment were intended to give liberty of expression, compared to other important liberties, the broadest scope that could be countenanced in our constitutional democracy. *Bridges v. State of California*, 314 U.S. 252, 265-66 (1941). Therefore, determining whether a statute impinges on the fundamental principles within the First Amendment is crucial. The plain meaning and legislative intent of Texas Penal Code section 42.07

implicates the First Amendment's freedom of expression.

The statute uses the word "communication" six times. The plain meaning of "communication," whether through words or conduct, is expression protected by the First Amendment. Where a person is punished pursuant to a law that restricts "communication," the law is a content-based restriction on the First Amendment freedom of expression, subject to strict scrutiny. *See Hill v. Colorado*, 530 U.S. 703, 714-18 (2000).

Central to the First Amendment is a broad right to access. *See, e.g., Stanley v. Georgia,* 394 U.S. 557, 564 (1969) (right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 483-85 (1965) (right to privacy); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-62 (1958) (right of association). The free flow of communication cannot be restricted without a compelling state interest. *Connick v. Myers*, 461 U.S. 138, 161 (1983); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980); *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The legislative intent reveals that Texas Penal Code section 42.07 violates these fundamental First Amendment rights.

In 2001, the statute was amended to prohibit certain electronic communications. The legislative intent reveals concerns with the First Amendment implications of the statute. The Texas House Committee Report states that some legislators were disturbed

with the broad scope of the law, asserting that the statute should be limited to "cover electronic communication that threatens bodily injury or to commit a felony against a person or a member of the person's family or household." House Comm. On Criminal Jurisprudence, Committee Report, Tex. S.B. 139, 77th Leg., R.S. (2001). Importantly, a threat of bodily injury or a threat of a felony are both more objective standards, are almost exclusively conduct-based, and are likely within the 'true threat' limitation outlined by the Supreme Court. *See Watts v. United States*, 394 U.S. 705 (1969). The substitution of those standards may limit the statute's First Amendment exposure.

Instead, the current statute includes the broad and vague language that was criticized during the passage of the 2001 amendment, and in case law because it includes speech and conduct that may be "annoying but should not be a criminal offense." House Comm. On Criminal Jurisprudence, Committee Report, Tex. S.B. 139, 77th Leg., R.S. (2001).

Most importantly, the 2001 amendment to the statute repeated the infirmities of the old Texas Penal Code section 42.07 that were supposed to be corrected by *Kramer v. Price* and *Long v. State*. In *Kramer v. Price,* the Fifth Circuit held that the words "annoy" and "harm" implicated the First Amendment in the prior Texas harassment statute. *See Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983). However, after the 2001 amendment, the current version of Texas Penal Code section 42.07 suffers from the same problem remedied

by *Kramer* and *May*. *See May*, 765 S.W.2d at 440. The inclusion of "alarm," "annoy" and "harm" in both Texas Penal Code section 42.07(a)(4) and (b)(7) implicates the First Amendment. And when "the statute's language is capable of reaching protected speech or otherwise threatens to inhibit the exercise of constitutional rights" a First Amendment analysis is necessary. *Village of Hoffman Estates, et al. v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982).

Harassment Statute is Overbroad

The harassment statute, as enacted, is overbroad and facially unconstitutional because its series of vague terms inhibit the free exercise of the First Amendment rights of citizens. A statute is overly-broad under the First Amendment if the terms of the challenged statute are broad enough to suppress legitimately protected First Amendment rights. *Gooding v. Wilson,* 405 U.S. 518, 522 (1972). The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial, judged in relation to the statute's legitimate sweep. *See City of Chicago v. Morales,* 527 U.S. 41, 52 (1999) (citing *Broadrick v. Oklahoma,* 413 U.S. 601 (1973)). To attack a statute on overbreadth grounds, one must show either that every application of the statute creates an impermissible risk of the suppression of ideas, or that the statute is "substantially" overbroad, meaning there is a realistic danger that the statute itself will significantly compromise

First Amendment protections of third parties. *See New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 11 (1988); *City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797-99 (1984).

Political Speech and Freedom of the Press

The political ramifications of this statute have the potential for extreme abuse. The Texas harassment statute is overbroad because it restricts pure political speech and prevents the exercise of a free press. The statute defines electronic communication as "a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system." The statute restricts speech during television and radio call in shows with political topics.

Radio personalities Rush Limbaugh, Don Imus, and Howard Stern intentionally annoy, harass and alarm listeners over radio waves daily, but often the topics expressed in that medium are central to the protections of the First Amendment. If these commentators are intending to annoy listeners in Texas, then the statute is implicated. The statute also prohibits political television talk shows such as Glen Beck, Shawn Hannity, Keith Olbermann, and Bill O'Reilly, where guests appear and verbally fight ferociously with one another. If one guest was appearing *via* satellite from Texas and was annoyed or harassed by another guest on the show, then the

statute would be implicated. If a television personality was insulting, harassing, or annoying the President of the United States while on a visit to Texas, then the statute would be implicated. Texas Penal Code section 42.07 makes this illegal.

The harassment statute is implicated every time a stand-up comedian takes the stage in Texas. If a comedian on a stage in Texas, political or otherwise, insults and harasses an audience member, the fact that he uses a microphone that "transmits" the "sound" "signal" through a "wire" to the speakers in the audience would cause a criminal violation of section 42.07. Texas Penal Code section 42.07 makes this illegal.

When "Tea Party" Protestors, unhappy with their government gather to peacefully and lawfully protest, the Texas Penal Code section 42.07 has the potential to be implicated. A citizen at a peaceful, permitted, political rally who employs the use of a public address system or bull horn to express his opinions through speech intending to harass politicians and opponents who are present may be arrested for a violation of section 42.07. This is precisely the type of speech the framers of the Constitution intended to protect. The only difference between then and now is that technology allows for the use of electronic speakers rather than soapboxes. Texas Penal Code section 42.07 makes this illegal.

The essence of civil disobedience is harassment of the ideas of the status quo. When Martin Luther King

gave his "I have a Dream" speech on August 28, 1963, he used a microphone and a television. The civil rights movement was about civil disobedience and challenging, harassing, and annoying the ideas of the establishment. No doubt there were those present that day who heard his famous words and were extremely annoyed by his voice and purpose. Were he to give that speech in Texas today rather than on the steps of the Lincoln Memorial in 1963, under the current version of section 42.07 any objecting law enforcement officer could arrest him simply for speaking. Texas Penal Code section 42.07 makes this illegal. Furthermore, while burning a flag on the steps of the Supreme Court is protected speech, emailing a picture of a burning flag to someone who would be offended is a crime. There is absolutely no denying the chilling effect of Texas Penal Code section 42.07.

During the height of every election cycle currently millions of Texans receive so-called "robo-calls" promoting or degrading political candidates or ideas. The purpose for these electronic communications is specifically to alarm the intended recipient of the importance of their vote. Texas Penal Code section 42.07 makes this illegal.

Who hasn't received intentionally annoying emails regarding any number of offensive products and ideas; this is the very definition of "Spam." Texas Penal Code section 42.07 makes this illegal.

In our fast growing social media world Twitter, Facebook, Myspace, and any number of blogs all facilitate electronic communication. It is absolutely legal and expected that in societies people will argue, debate and verbally confront each others' ideas. When one annoys another on the street corner, or at a town hall meeting, or even in the newspaper opinionated editorial section no one can be arrested. But if someone tweets, chats, posts or blogs the same, Texas Penal Code section 42.07 makes it illegal.

As the Supreme Court stated, "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field every person must be [a] watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us." *Thomas v. Collins,* 323 U.S. 516, 545 (1945). Texas Penal Code section 42.07, as written, is capable of invading that fundamental purpose of the First Amendment. The statute can be applied to foreclose the citizens of this State to argue over political truth. Argument over political truth is the very heart of the First Amendment, even and perhaps especially if that argument is intentionally annoying and alarming.

Content-Based Restrictions on Speech and Expressive Conduct

The Texas harassment statute is a content-based restriction for a number of important reasons. While the statute does not specify exact words or specific

content that is prohibited, it criminalizes argumentative speech and dissent. The incidental effect is to chill many other types of traditionally protected speech. For example religious, political, and commercial speech will inevitably be implicated when people argue about these issues and use telephones, emails, or any other electronic devices. The statute also limits new areas of speech that have not been previously regulated. It regulates certain types of private speech that before the age of electronic media and the ability to capture private speech were never regulated. In the past, society could never capture and memorialize private speech so readily as it can today. A few decades ago, private arguments and heated debates between married couples or friends and colleagues could never be scrutinized by law enforcement, but now because of new technology, offended parties can share arguments and quarrels with the world, and in Texas have them arrested.

The statute is a content-based restriction because it restricts the type of communication that can be legally conveyed. It prohibits alarming and offensive communication when conveyed through any of several electronic methods of communication. "Regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" are subject to "the most exacting scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

The standard of scrutiny applied to a content-based restriction on expressive conduct is whether the government can demonstrate that the restriction

is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Benefit v. Cambridge,* 424 Mass. 918, 925, 679 N.E.2d 184 (1997), quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). *See R.A.V. v. St. Paul,* 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) ("Content-based regulations are presumptively invalid"). Section 42.07 fails the strict scrutiny test because it is overbroad in that it restricts speech that is included within the First Amendment's protections.

There are instances where a content-based restriction may be valid. However, these exceptions are clearly defined and Texas Penal Code section 42.07 fails to comply with any of them.

Advocacy of the use of force or violation of the law, which is directed to inducing or producing imminent lawless action and is likely to induce or produce such action, may be proscribed. *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Kinglsey Intern. Pictures Corp. v. Regents of University of State of N.Y.*, 360 U.S. 684 (1959). Additionally, the "clear and present danger" doctrine provides protection for expression unless in the expressions "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils." *Schenck v. United States*, 249 U.S. 47, 52 (1919). The government may cut off a person's right to speak his or her views only when those views threaten, clearly and imminently, to ripen into

conduct against the public. *See American Communications Ass'n, C.I.O. v. Douds*, 399 U.S. 382 (1950). Additionally, making a reasonable threat to someone's life may be restricted. *See Watts v. U.S.*, 394 U.S. 705, 707 (1969).

None of the established doctrines are present within the Texas harassment statute. The statute does not encompass fighting words nor clear and present danger. Texas Penal Code sections 42.07(a)(4) and (a)(7) require the use of an electronic communications device. The legislative intent from the 2001 amendment reveals concern that the statute's electronic communications amendment would again be unconstitutional. Opponents to the amendment wanted to limit the statute's coverage to "cover electronic communication that threatens bodily injury or to commit a felony against a person or a member of the person's family or household." House Comm. On Criminal Jurisprudence, Committee Report, Tex. S.B. 139, 77th Leg., R.S. (2001). Threats of bodily injury comply more closely with the Supreme Court's perspective in *Watts*. *See Watts v. U.S.*, 384 U.S. 705, 707 (1969).

However, as the statute currently exists, the imminent requirement of both the fighting words doctrine and the clear and present danger doctrine are completely absent. An individual must meet a perhaps impossible burden to create an imminently violent environment from miles away and over the telephone or through other electronic communications devices.

The harassment statute is not a time, place, and manner restriction because it is not a "viewpoint neutral" restriction. To be viewpoint neutral, a regulation must not be based on the speech's topic. In *Carey v. Brown*, the Supreme Court held unconstitutional an ordinance prohibiting all picketing in residential neighborhoods unless it was labor picketing related to a place of employment. *See Carey v. Brown*, 447 U.S. 455, 471 (1980). The Court's rationale was that although the statute did not restrict which view about labor may be expressed, the ordinance prohibited all speech except that which related to the subject of labor. *See id.* at 468. Therefore, the Court held, the regulation was content based and invalid. Id. In the same way, Texas Penal Code section 42.07(4) and (7) prohibit speech based on its topic.

Private Argumentative Speech

In addition to prohibiting political and religious speech in public fora, the harassment statute treads on a new area of unrecognized speech. Conflict and the resolution thereof is at the heart of all interpersonal relationships. Just as public protest, vigorous debate and dissent are crucial for a healthy and vibrant democracy, so too are private verbal argument and conflict, which are inherent in healthy human relationships. Private argument and debate are the genesis of public protest and change. There is no spoken word of public discord that was not first uttered in private. All political debate starts in private. Central to the private lives of Americans in

the twenty-first century are electronic communications.

Private argumentative speech can consist of vigorous debate on Internet blogs and through emails between college students who share a political science class or it can exist between parents discussing how to raise their children. Private argumentative speech does not always involve political or religious topics. In the case of familial relationships, it is at the heart of communication between friends and family, a place that should be excluded from government control or intrusion. Whether a husband and wife are arguing on the telephone about their marital problems or whether a father is harassing his teenaged son to make the right decisions in his life, private argumentative speech should be protected. Furthermore, strict scrutiny should be the standard used to restrict private argumentative speech.

Distinctions between Electronic and Face-to-Face Communications

The Texas harassment statute and the Texas Court of Criminal Appeals have drawn a dangerous and unwarranted distinction between open-air, face-to-face communications and electronic communications. The regulation implicates the massive and ever expanding electronic medium of exchange that is now as vital for communication as the air though which the sound of our voices travel in face-to-face communication. Texas and the other states have

circumvented restrictions placed upon them by the First Amendment by making these distinctions between open-air or face-to-face communications and electronic communications. Every state and province of the United States has enacted a criminal statute regulating electronic communication. *See* Appendix at page 148. Clearly, the pervasiveness of this type of regulation calls out to this Court to address this distinction and require that traditional First Amendment protections apply or provide new guidance to the legislators on how to properly regulate electronic communications.

If a distinction is to be recognized, it would be more just that the regulation of electronic communication be less restrictive than what is permissible under traditional First Amendment protections. Electronic communication is generally exchanged by people who are physically remote from one another. The type of imminent harm associated with fighting words thus disappears. Furthermore, there are more self-help protections available to the average citizen to avoid potentially troublesome use of the electronic communication devices. Unwanted calls, emails, and communication over social media such as Facebook can be blocked or filtered. Phones, computers, and other electronic media devices can simply be turned off. If these distinctions are to be recognized, then this Court should take this opportunity to provide a more thoughtful analysis of First Amendment considerations.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DONALD H. FLANARY, III.*
GOLDSTEIN, GOLDSTEIN & HILLEY
310 South St. Mary's Street,
Suite 2900
San Antonio, Texas 78205
210-226-1463
210-226-8367 facsimile
donflanary@hotmail.com

CHAD P. VAN BRUNT,
Attorney and Counselor

**Attorney of Record*
Representing Samuel Scott

SAMUEL SCOTT, Appellant

v.

THE STATE OF TEXAS

Nos. PD-1069-09 & PD-1070-09

COURT OF CRIMINAL APPEALS OF TEXAS

322 S.W.3d 662; 2010 Tex. Crim. App. LEXIS 1249

October 6, 2010, Delivered

COUNSEL: For APPELLANT: DONALD H. FLANARY, III, SAN ANTONIO.

For STATE: KEVIN PATRICK YEARY, ASST. CRIM. D.A., SAN ANTONIO, JEFFREY L. VAN HORN, STATE'S ATTORNEY, AUSTIN.

JUDGES: HOLCOMB, J., delivered the opinion of the Court, in which PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, and COCHRAN, JJ., joined. JOHNSON, J., filed a concurring opinion, in which COCHRAN, J., joined. KELLER, P.J., filed a dissenting opinion. MEYERS, J., did not participate.

OPINION BY: HOLCOMB

OPINION

The court of appeals held that two subsections of our harassment statute, Texas Penal Code § 42.07, were unconstitutionally vague on their face. We reverse.

On April 24, 2006, in Bexar County, Samuel Scott was charged by information with one count of harassment, a misdemeanor offense. The information alleged, in relevant part, that:

> "on or about the 5th Day of December, 2005, Samuel Scott, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did make repeated communications to the complainant, to wit: telephone calls, in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant."

On July 11, 2006, again in Bexar County, Scott was again charged by information with harassment. The information alleged, in relevant part, that:

> "on or about the 12th Day of March, 2006, Samuel Scott, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did make repeated telephone communications to the complainant in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant, to wit: the defendant called the complainant repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail messages."

Sometime thereafter (the record does not reveal the exact date), Scott filed a motion to quash the two

charging instruments. In his motion, Scott, citing both the First and Fourteenth Amendments to the United States Constitution, argued that Texas Penal Code § 42.07, the statute under which he was charged, was unconstitutional on its face[1] because it was both unduly vague and overbroad.[2] He argued further that the statute's vagueness and overbreadth threatened "to induce individuals to forgo [their] First Amendment rights [to free speech] for fear of violating an unclear law." Scott, citing our decision in *Long v. State*, 931 S.W.2d 285, 288 (Tex.Crim.App.1996), noted that "when [as here] a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may

---

[1] A statute may be challenged as unconstitutional "on its face" or "as applied." A claim that a statute is unconstitutional "on its face" is a claim that the statute, by its terms, always operates unconstitutionally *Gillenwaters v State*, 205 S W.3d 534, 536 n 2 (Tex Crim.App 2006) A claim that a statute is unconstitutional "as applied" is a claim that the statute operates unconstitutionally with respect to the claimant because of his particular circumstances *Id* at n. 3.

[2] A statute may be challenged as unduly vague, in violation of the Due Process Clause of the Fourteenth Amendment, if it does not (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) establish definite guidelines for law enforcement *Bynum v State*, 767 S W.2d 769, 773 (Tex Crim App 1989) A statute may be challenged as overbroad, in violation of the Free Speech Clause of the First Amendment, if, in addition to proscribing activity that may be constitutionally forbidden, it sweeps within its coverage a substantial amount of expressive activity that is protected by the First Amendment *Morehead v State*, 807 S.W 2d 577, 580 (Tex Crim.App 1991)

not be unconstitutional as applied to the defendant's conduct." Notably, Scott did not argue that § 42.07 was vague as applied to his conduct, i.e., that the statute failed to give him a reasonable opportunity to know that the conduct for which he was charged was prohibited.[3]

On June 25, 2008, the trial court held a hearing on Scott's motion to quash. Neither Scott nor the State presented any evidence at that hearing. Just

---

[3] Ordinarily, a criminal defendant who challenges a statute as unduly vague must show that it is vague as applied to the conduct for which he was charged. *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); *Bynum v. State*, 767 S.W.2d 769, 774 (Tex.Crim.App. 1989). However, if the challenged statute implicates the free-speech guarantee of the First Amendment – i.e., if the statute, as authoritatively construed, is susceptible of application to speech guaranteed by the First Amendment – then the defendant is permitted to argue that the statute is overbroad on its face because it is unclear whether it regulates a substantial amount of protected speech. *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); *Gooding v. Wilson*, 405 U.S. 518, 520-21, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972). This exception to the usual rule is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights. *Gooding v. Wilson*, 405 U.S. at 521. In the cases before us today, Scott's argument, as we understand it, is that § 42.07 is overbroad on its face because its inherent vagueness makes it unclear whether it prohibits a substantial amount of protected speech.

Note: In this opinion, we use the word "speech" and the phrases "communicative conduct" and "expressive activity" interchangeably; in the First Amendment context, they mean the same thing.

after the start of the hearing, Scott explained to the trial court that he believed that the April 24, 2006 information had been brought under Texas Penal Code § 42.07(a)(4), whereas he believed that the July 11, 2006 information had been brought under § 42.07(a)(7).[4] Toward the end of the hearing, Scott, when queried on the matter by the trial court, appeared to concede

---

[4] Texas Penal Code § 42.07 provides, in relevant part:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he
>
> * * *
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;
>
> * * *
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.
>
> (b) In this section:
>
> (1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system. The term includes:
>
> (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine, and
>
> (B) a communication made to a pager.

that both charging instruments had been brought under § 42.07(a)(4).

As for the substance of his motion to quash, Scott reiterated the arguments that he had made in his written motion. In addition, he argued that: (1) § 42.07(a)(4) and (a)(7) were both unconstitutionally vague and overbroad on their face because the terms "annoy" and "alarm" included in those statutory subsections were "inherently vague"; (2) neither statutory subsection clearly indicated "whose sensibilities must be offended"; (3) neither statutory subsection clearly indicated "the standard by which the [prohibited] conduct [was] to be assessed"; and (4) the specific intent elements included in the statutory subsections did not save them from vagueness.

The State, in response, did not address the merits of Scott's arguments. Instead, the State argued simply that "[t]here is no court that has any jurisdiction over this specific [trial] court that has ruled that specific statute to be unconstitutionally vague."

At the conclusion of the hearing, the trial court denied Scott's motion to quash. Shortly thereafter, Scott pled nolo contendere, pursuant to a plea bargain, to each harassment charge. The trial court then assessed Scott's punishment in each case at incarceration for two days and a $50 fine.

On direct appeal, Scott reiterated the arguments that he had made in the trial court. In addition, he argued, for the first time,[5] that: (1) § 42.07(a)(4) and (a)(7) were both unconstitutionally vague as applied to his conduct (although he failed to explain *how* they were unconstitutionally vague as applied to his conduct); and (2) § 42.07(a)(4) and (a)(7) were both unconstitutionally vague and overbroad because the terms "abuse," "torment," "embarrass," and "repeated" included in those statutory subsections were "inherently vague."[6]

The State, in response to Scott's arguments, argued that: (1) both charging instruments tracked the language of § 42.07(a)(4) and charged Scott under that statutory subsection; (2) § 42.07(a)(4) was neither unconstitutionally vague nor overbroad; (3) § 42.07(a)(4) did not implicate the free-speech guarantee of the First Amendment; and (4) "the fact

---

[5] Scott's arguments, because they were untimely, were not preserved for appellate review *Gillenwaters v State*, 205 S W.3d 534, 537 (Tex Crim App 2006); Tex R App Proc 33.1

[6] In the court of appeals and in this Court, Scott relies primarily upon *Kramer v Price*, 712 F.2d 174 (5th Cir 1983), *reh'g en banc granted*, 716 F.2d 284 (5th Cir 1983), *grant of relief aff'd*, 723 F 2d 1164 (5th Cir 1984), *Long v. State*, 931 S W 2d 285 (Tex Crim App 1996), *May v. State*, 765 S W 2d 438 (Tex Crim.App. 1989), and *Karenev v State*, 258 S W 3d 210 (Tex App. – Fort Worth 2008), *rev'd on other grounds*, 281 S.W 3d 428 (Tex Crim.App 2009) In none of those cases, however, did the court address the primary question that we address today whether § 42 07(a)(4), as currently written, implicates the free speech guarantee of the First Amendment

that [Scott] chose [in the trial court] not to challenge the statute as applied to [his conduct] constitute[d] a failure to preserve [that] issue for appellate review."

The court of appeals agreed with Scott's arguments, reversed the trial court's judgments, and rendered judgments of acquittal. *Scott v. State,* 298 S.W.3d 264 (Tex.App. – San Antonio 2009). More specifically, the court of appeals held that: (1) the July 11, 2006 information, which involved allegations of harassing voice-mail messages, could have been brought under § 42.07(a)(7) because voice mail messages fell within the statutory definition of "electronic communication"; (2) § 42.07(a)(4) and (a)(7) both implicated the free speech guarantee of the First Amendment;[7] and (3) the terms "annoy," "alarm," "abuse," "torment," "embarrass," and "repeated"

---

[7] The court of appeals explained this particular holding as follows

> "We hold that subsections (a)(4) and (7) do implicate First Amendment freedoms What is 'annoying,' 'embarrassing,' or even 'alarming' may be protected speech. For example, political calls made repeatedly during election season could fall under subsection (a)(4) if the caller is intending to alarm the recipient concerning a particular candidate. Further, we note that subsection (a)(7)'s 'electronic communications' could encompass some talk radio and television programming" *Scott v. State,* 298 S W 3d 264, 269 (Tex App. – San Antonio 2009).

contained in the two statutory subsections were all unconstitutionally vague.[8]

We granted the State's petition for discretionary review, which raised six grounds,[9] in order to determine

---

[8] *Scott v State,* 298 S.W 3d 264, 267, 269, 270 (Tex App – San Antonio 2009)

[9] The State's petition covers both cases The State's grounds read as follows

> (1) Are subsections (a)(4) and (a)(7) of Texas Penal Code § 42 07 unconstitutionally vague?
>
> (2) Do subsections (a)(4) and (a)(7) of Texas Penal Code § 42 07 implicate the First Amendment to the United States Constitution?
>
> (3) Are the term "repeated" and the phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another," which are both contained within Texas Penal Code § 42.07(a)(4) and (a)(7), unconstitutionally vague?
>
> (4) Did the State's allegation that appellant left "voice mail messages" implicate Texas Penal Code § 42 07(a)(7) in this case, and does that phrase necessarily fall within the definition of "electronic communication" found at Texas Penal Code § 42 07(b)(1)?
>
> (5) If some part of Texas Penal Code § 42 07 is unconstitutionally vague, did the Court of Appeals err by declaring it vague and acquitting appellant instead of applying a narrow construction to the statute to avoid the alleged vagueness?
>
> (6) Has the Court of Appeals improperly determined that because subsections (a)(4) and (a)(7) of Texas Penal Code § 42 07 allegedly implicate the First Amendment and might curtail protected speech those subsections are vague, when the proper question should have been whether the subsections are overbroad?

whether the court of appeals erred in its analysis. *See* Tex. R. App. Proc. 66.3(d).

We turn first to the State's fourth ground for review, in which the State argues that the court of appeals erred in addressing the constitutionality of § 42.07(a)(7). The State argues that, contrary to the court of appeals's conclusion, the July 11, 2006 information against Scott charged him under § 42.07(a)(4), not (a)(7).

A careful reading of the July 11, 2006 information, which we quoted earlier, reveals that it tracks the language of § 42.07(a)(4), which we also quoted earlier, but not the language of (a)(7). Furthermore, the text of (a)(4) suggests that it covers ordinary voice (and therefore voice mail) communication involving an ordinary telephone, whereas the text of (a)(7) suggests that it covers various types of non-telephonic, "electronic" communication, e.g., e-mail, instant message, etc. Therefore, we conclude that the July 11, 2006 information against Scott was brought under § 42.07(a)(4) and that the court of appeals erred in addressing the constitutionality of § 42.07(a)(7). We sustain the State's fourth ground for review.

We turn next to the State's second ground for review, in which the State argues that the court of appeals erred in concluding that § 42.07(a)(4) implicated the free-speech guarantee of the First Amendment. The question of whether the statutory subsection implicates the free-speech guarantee is

important in the cases before us, because if the statutory subsection *does* implicate the free-speech guarantee, then Scott, in making his vagueness challenge, is relieved of the usual requirement of showing that the statutory subsection was unduly vague as applied to his conduct. *See* footnote three, *supra.*

To answer the question of whether § 42.07(a)(4) implicates the free-speech guarantee of the First Amendment, we must first determine the protection afforded by the free-speech guarantee, and then we must determine the meaning of § 42.07(a)(4). The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." This guarantee of free speech, which was made applicable to the various states by the Due Process Clause of the Fourteenth Amendment, *Gitlow v. New York,* 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), generally protects the free communication and receipt of ideas, opinions, and information, *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). In a nation of ordered liberty, however, the guarantee of free speech cannot be absolute. The State may lawfully proscribe communicative conduct (i.e., the communication of ideas, opinions, and information) that invades the substantial privacy interests of another in an essentially

intolerable manner. *Cohen v. California,* 403 U.S. 15, 21, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).[10]

Turning to the meaning of § 42.07(a)(4), we find that, given the allegations in the charging instruments, the relevant portion of (a)(4) reads as follows: "A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he . . . makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." We notice several things about that text.[11] First, the text requires that the actor have the specific intent to harass, annoy, alarm, abuse, torment, or embarrass the recipient of the telephone call. That is, the text requires that the actor have the intent to inflict harm on the victim in the form of one of the

---

[10] *See* M. Royall, *Constitutionally Regulating Telephone Harassment An Exercise in Statutory Precision,* 56 U Chi L Rev 1403, 1418 (1989) (The *Cohen v California* "intolerability" standard is "useful [for] evaluating telephone harassment statutes")

[11] When we interpret a statute, our constitutional duty is to determine and give effect to the apparent intent of the legislators who voted for it In determining this apparent legislative intent, we focus our attention on the text of the statute and ask ourselves, how would ordinary legislators have understood that text? *Whitehead v State,* 273 S W 3d 285, 288 (Tex Crim App 2008), *Boykin v. State,* 818 S.W 2d 782, 785 (Tex Crim App 1991) We also presume that the legislators were aware of their constitutional obligations and intended a constitutional statute *State v Edmond,* 933 S W 2d 120, 124 (Tex Crim App 1996), 82 C.J S. *Statutes* § 381 (2009)

listed types of emotional distress. Second, the text requires that the actor make repeated telephone calls to the victim; one telephone call will not suffice.[12] Third, the text requires that the actor make those telephone calls in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend an average person.[13] Fourth, the text does not require that the actor use spoken words.

Having examined the text of § 42.07(a)(4), we conclude that it is not susceptible of application to

---

[12] The term "repeated" is commonly understood to mean "reiterated," "recurring," or "frequent." *Webster's Ninth New Collegiate Dictionary* 998 (1988), 2 *Oxford English Dictionary* 2494 (1971). Here, we believe that the Legislature intended the phrase "repeated telephone communications" to mean "more than one telephone call in close enough proximity to properly be termed a single episode," because it is the frequent repetition of harassing telephone calls that makes them intolerable and justifies their criminal prohibition. *See* M. Royall, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. Chi. L. Rev. 1403, 1430 (1989) ("Prudence may justify a hands-off policy for single calls made with the intent to harass, but as harassing calls are repeated the state interest in intervening to protect the recipient becomes more compelling.")

[13] The terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and "offend" all have commonly understood definitions that are relevant in this context. "Harass" means "to annoy persistently." "Annoy" means to "wear on the nerves by persistent petty unpleasantness." "Alarm" means "to strike with fear." "Abuse" means "to attack with words." "Torment" means "to cause severe distress of the mind." "Embarrass" means "to cause to experience a state of self-conscious distress." "Offend" means "to cause dislike, anger, or vexation." *Webster's Ninth New Collegiate Dictionary* 47, 68, 88, 405, 552, 819, and 1245 (1988).

communicative conduct that is protected by the First Amendment. In other words, the statutory subsection does not implicate the free-speech guarantee of the First Amendment. The statutory subsection, by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress. Given that plain text, we believe that the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words.[14] That is to say, in the

---

[14] In *Jones v Municipality of Anchorage*, 754 P.2d 275 (Alaska App 1988), the court addressed the constitutionality, under the First Amendment, of a city ordinance that read "It is unlawful for any person to anonymously or repeatedly telephone another person for the purpose of annoying, molesting, or abusing through patently offensive and profane language, or harassing that person or his family" The court upheld the ordinance, explaining, in relevant part, that the ordinance "restrict[ed] speech only when it [was] essentially noncommunicative – in other words, only when the speech [was] devoid of any substantive information and [was] solely and specifically intended by the speaker to evoke an adverse emotional response from the listener" *Id.* at 279.

In *State v Thorne*, 175 W. Va. 452, 333 S.E.2d 817 (W Va 1985), the court addressed the constitutionality, under the First Amendment, of a statute that read "It shall be unlawful for any person to harass or abuse another by means of [a] telephone to [m]ake repeated telephone calls, during which conversation ensues, with intent to harass any person at the called number" The court upheld the statute, explaining, in relevant part "Prohibiting harassment is not prohibiting speech, because harassment is not speech Harassment is not communication, although it may take

(Continued on following page)

usual case, persons whose conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake. To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.[15] We sustain the State's second ground for review.

---

the form of speech The statute prohibits only telephone calls made with the intent to harass Phone calls made with an intent to communicate are not prohibited" *Id* at 819

In *State v Elder,* 382 So 2d 687 (Fla 1980), the court addressed the constitutionality, under the First Amendment, of a statute that read "Whoever by means of telephone communication . . . [m]akes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number shall be guilty of a misdemeanor" The court upheld the statute, explaining, in relevant part, that the statute was "not directed at the communication of opinions or ideas, but at conduct, that is, the act of making a telephone call or a series of telephone calls, without disclosing identity and whether or not conversation ensues, with the intent to annoy, abuse, threaten or harass the recipient of the call That this conduct may be effected in part by verbal means does not necessarily invalidate the statute on freedom of speech grounds." *Id* at 690

[15] In *State v Smith,* 89 Misc 2d 789, 392 N.Y.S 2d 968 (App.Div 1977), the court addressed the constitutionality, under

(Continued on following page)

Given our disposition of the State's second and fourth grounds for review, we need not reach the State's remaining grounds for review. We dismiss them.

Because § 42.07(a)(4) does not implicate the free-speech guarantee of the First Amendment, Scott, in making his vagueness challenge[16] to that statutory subsection, was required to show that it was unduly vague as applied to his own conduct. He has not done that. Therefore, his vagueness challenge fails.

We reverse the judgments of the court of appeals and affirm the judgments of the trial court.

DELIVERED OCTOBER 6, 2010

PUBLISH

---

the First Amendment, of a statute that read: "[A person commits an offense] when, with intent to harass, annoy, threaten or alarm another person, he [c]ommunicates with a person, anonymously or otherwise, by telephone . . in a manner likely to cause annoyance or alarm." The court upheld the statute, explaining, in relevant part, that the statute "was intended to include . . . communications which are directed to an unwilling recipient under circumstances wherein substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* at 791.

[16] As we explained in footnote three, supra, we understand Scott's argument to be that § 42.07(a)(4) is overbroad *because* it is inherently vague.

CONCUR BY: JOHNSON

CONCUR

JOHNSON, J., filed a concurring opinion, in which COCHRAN, J., joined.

CONCURRING OPINION

Harassment, as defined in this statute, requires an intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another in a manner reasonably likely to attain its goal; it does not require that the intended result actually occur. Because the intent is that of the speaker, that person must intend to do something that he or she believes would harass, annoy, alarm, abuse, torment, embarrass, or offend another and to do so repeatedly. While communication of some political view or expression of a personal opinion is protected speech, it is completed with one contact. If expressed to the same hearer repeatedly, such a "communication" may become harassment, as the pertinent information has already been communicated and no longer has a legitimate purpose.

I find it odd to divide the various actions into two groups based on the dubious distinction of being more or less "intense" emotionally. Why are "annoy," "alarm," "embarrass," and "offend" less invasive of privacy than "harass," "abuse," and "torment"? Given the context, "alarm" is directed at the hearer's alarm over the possibility of personal harm, a reasonable

reaction, not alarm that the neighbor is having an affair or that a candidate for mayor has purportedly converted to a religion that the hearer does not approve of. Some hearers might experience extremely emotional embarrassment from being publicly exposed as a liar. Other hearers might not be even unsettled by a threat of bodily injury. One has only to keep up with current events to view the emotional extremes to which some persons will go when they are "offended."

Harassment is in the mind of the speaker, not the hearer. The speaker who intends to harass, annoy, alarm, abuse, torment, embarrass, or offend another has himself defined, for that purpose, both the applicable term and the word "repeatedly." They are not vague or over-broad for the speaker; they are clearly and precisely known. There is no ambiguity of intent in the mind of the speaker, and intent undergirds the offense.

I join the opinion of the Court.

Filed: Otober 6, 2010

Publish

DISSENT BY: KELLER

DISSENT

KELLER, P.J., filed a dissenting opinion.

I believe that parts of the harassment statute implicate First Amendment freedoms and that those parts violate the Constitution. I therefore respectfully dissent.

A. Prior Texas Cases

Our decisions in *Long v. State*[1] and *May v. State*,[2] and the Fifth Circuit's decision in *Kramer v. Price*,[3] set the backdrop for the claim we now face.[4] These decisions invalidated statutes that contained the terms "annoy" and "alarm" as implicating First

---

[1] 931 S.W.2d 285 (Tex Crim App. 1996)

[2] 765 S W.2d 438 (Tex Crim App 1989)

[3] 712 F 2d 174 (5th Cir 1983), *rehearing en banc granted*, 716 F.2d 284 (5th Cir 1983), *grant of relief affirmed*, 723 F.2d 1164 (5th Cir 1984)

[4] *Long* analyzed a similar issue as a vagueness claim with First Amendment implications The Supreme Court's opinion in *Holder v. Humanitarian Law Project*, 130 S Ct. 2705, 2718-19, 177 L Ed 2d 355 (2010) (citing *United States v. Williams*, 553 U.S 285, 304, 128 S. Ct. 1830, 170 L Ed 2d 650 (2008)), indicates that the proper analysis might be more appropriately characterized as a First Amendment overbreadth claim with a vagueness component. I analyze the issue in accord with *Humanitarian Law Project*, but the analysis is essentially the same

Amendment freedoms and being unduly vague.[5] In its opinion today, the Court's only attempt to distinguish these cases is to say that they involved different versions of the harassment statute than the one that is currently before us.[6]

But the harassment provision at issue in the present case is similar in pertinent ways to the stalking provision that we invalidated in *Long*. The part of the harassment statute at issue provides:

> A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he . . . makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.[7]

The stalking provision in *Long* provided in relevant part:

A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he . . . on more than one occasion engages in

---

[5] *See Long*, generally; *May*, 765 S W.2d at 440 (following and quoting *Kramer*, 712 S.W.2d at 178 "By failing to provide reasonably clear guidelines, § 42 07 gives officials unbounded discretion to apply the law selectively and subjects the exercise of the right of speech to an unascertainable standard ")

[6] Court's op. at 5 n 6

[7] TEX PENAL CODE § 42.07(a)(4)

conduct . . . that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person.[8]

A comparison of these passages reveals only three features in the current statute that were not in the former stalking provision: (1) the use of "repeated" instead of "on more than one occasion," (2) the additional emotional state of "offend" in the current statute, and (3) the limitation of the current statute to telephone communications.

B. "Repeated"

The term "repeated" introduces an ambiguity not present with the "on more than one occasion" language in the former stalking statute. Is conduct "repeated" if it occurs twice? If the two occurrences are a year apart? Does it matter whether the circumstances show that the multiple instances of conduct are connected to the same scheme or course of conduct?[9] With respect to the facial constitutionality of a statute, this ambiguity may be acceptable if First Amendment considerations are absent. In many cases, it would be clear that a person's conduct was "repeated," so we could adjudicate on a case-by-case basis whether a particular person was afforded

---

[8] *Long,* 931 S.W.2d at 288 (quoting the 1994 version of TEX. PENAL CODE § 42.07(a)(7))

[9] *See id.* at 291 (no nexus requirement in former stalking statute)

adequate notice under the statute.[10] But if First Amendment freedoms are at stake, we cannot allow the ambiguity in a statute to chill protected expression.[11]

The Court contends that we can read "repeated" to mean "more than one call in close enough proximity to properly be termed a single episode."[12] The Court fails to cite a single source, from a dictionary or otherwise, that limits "repeated" to actions in a single episode. Although a court has a general duty to employ "reasonable narrowing constructions" to avoid constitutional violations, it may not "assume the legislative prerogative and rewrite a statute" that is not "readily subject" to being narrowly construed.[13] Would once a day for a month constitute "a single episode?" Under any common understanding it would not, but it is hard to believe the Legislature did not intend to reach such conduct. As discussed below, the Legislature has a legitimate interest in proscribing conduct over the telephone that is intentionally

---

[10] *See Williams,* 553 U S at 304(outside the First Amendment context, a person "who engages in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.")

[11] *Long,* 931 S W 2d at 287; *Gooding v Wilson,* 405 U.S 518, 521, 92 S Ct 1103, 31 L Ed. 2d 408 (1972) (referring to the need to protect persons "who may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression")

[12] Court's op at 9 n 12

[13] *Long,* 931 S.W 2d at 295.

harassing, abusing, and tormenting. In my opinion, that interest would legitimately extend to multiple instances of conduct that could not reasonably be considered part of a single episode.

C. Offend

The term "offend" does nothing to obviate the concerns expressed in *Long*. We explained there that a person's intent to inflict a more intense emotional state than "annoy" might serve to take the First Amendment out of the picture.[14] But "offend" is no more intense an emotional state than "annoy" and "embarrass," which we concluded "probably describe the least intense emotional states available under the [stalking] statute."[15]

D. Telephone Communications

That leaves the remaining distinctive feature of the current harassment provision: the fact that it is limited to telephone communications. I agree with the Court that the First Amendment is not implicated when the "intent" and the "reasonably likely" effect of a person's conduct is to "harass," "abuse," or

---

[14] *Id.* at 293

[15] *See id.* at 296. In addition, "offend" appears only in the second of the two lists of emotional terms – relating to what emotional state the victim was "reasonably likely" to suffer. *See* TEX. PENAL CODE § 42.07(a)(4). The statute does not have a corresponding requirement of intent to offend. *Id.*, § 42.07(a).

"torment." But I would hold that the First Amendment is implicated when the "intent" or "reasonably likely" effect of a person's conduct is to "annoy," "alarm," "embarrass," or "offend."

1. *Binding Precedent*

In *Long,* we said that the terms "harass," "abuse," and "torment" carried a greater emotional intensity than "annoy" or "embarrass," though they still implicated First Amendment freedoms under the stalking statute.[16] The former stalking statute expansively covered "*any* conduct in which a person could possibly engage."[17] But the context in which the harassing conduct occurs can be important. Government can act, consistent with the First Amendment, to prevent "substantial privacy interests" from "being invaded in an essentially intolerable manner."[18] The State has the greatest leeway in regulating expression in favor of privacy interests when it seeks to "prohibit intrusion into the privacy of the home."[19] At the same time, the Supreme Court has stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[20]

---

[16] *Long,* 931 S.W.2d at 296

[17] *Id* at 289 (emphasis in original)

[18] *Cohen v California,* 403 U.S. 15, 21, 91 S Ct 1780, 29 L Ed 2d 284 (1971)

[19] *Id.*

[20] *Id* (some internal quotation marks omitted).

Telephone harassment under the current statute can sometimes occur in the home, but the statute does not limit it in that manner.

2. *Other Jurisdictions*

In *United States v. Bowker,* the Sixth Circuit addressed the constitutionality of the federal telephone harassment statute, which proscribed phone calls made by a person "without disclosing his identity and with intent to annoy, abuse, threaten, or harass."[21] The court identified two factors in upholding the constitutionality of the federal statute against a First Amendment overbreadth challenge.[22] First, the court explained that the federal statute focuses "not simply [on] annoying telephonic communications" but also prohibits "abusive, threatening or harassing communications."[23] Second, the court said, the statute operates in a more private realm in which the listener has to "deal with much more inconvenience to avoid" the unwanted speech, and the unidentified nature of the caller was more likely to

---

[21] *See United States v Bowker,* 372 F 3d 365, 377 n 3 (6th Cir 2004), *vacated on other grounds,* 543 U.S 1182, 125 S Ct 1420, 161 L Ed 2d 181 (2005)

[22] *Id* at 379; *see also United States v Eckhardt,* 466 F 3d 938, 943-44 (11th Cir. 2006) (following *Bowker*).

[23] *Bowker,* 372 F 3d at 379

instill fear in the listener and make it more difficult for the listener to confront the caller.[24]

The New Hampshire Supreme Court distinguished its state's telephone harassment statute from that in *Bowker* on two grounds: the state statute prohibited "all telephone calls placed with the intent to annoy or alarm" and it did not require anonymity.[25] The court found that the New Hampshire statute was not directed toward only those communications intended to instill fear in the victim, but instead swept far more broadly.[26] "Simply put," the court explained, "the First Amendment is made of sterner stuff."[27] The court concluded that the New Hampshire statute was overbroad because it covered a substantial amount of protected First Amendment speech, and there was a real likelihood that it might discourage citizens from exercising that speech.[28]

In *Galloway v. State*,[29] Maryland's court of last resort addressed the constitutionality of its harassment statute, which provided as follows:

> a) Course of conduct defined. – In this section "course of conduct" means a persistent pattern of conduct, composed of a series

---

[24] *Id*

[25] *State v Brobst*, 151 N.H 420, 422, 857 A 2d 1253 (2004)

[26] *Id*

[27] *Id.* at 423

[28] *Id.*

[29] 365 Md 599, 781 A.2d 851 (2001).

of acts over a period of time, that evidences a continuity of purpose.

(b) Applicability. – This section does not apply to any peaceable activity intended to express political views or provide information to others.

(c) Prohibited Conduct. – A person may not follow another person in or about a public place or maliciously engage in a course of conduct that alarms or *seriously* annoys another person:

(1) With intent to harass, alarm, or annoy the other person;

(2) After reasonable warning or request to desist by or on behalf of the other person; and

(3) Without a legal purpose.[30]

The *Galloway* court initially stressed the significance of the adverb "seriously" that preceded "annoy,"[31] but the court also noted a number of other restrictions that made the statute acceptable: the statute required "a reasonable warning to desist," it did not apply to "any peaceable activity intended to express political views or provide information to others," and it mandated that there be no "legal purpose" for the

---

[30] *Id.*, 365 Md. at 608-09, 781 A 2d at 856 (quoting Maryland Code, (1957, 1996 Repl Vol , 2000 Cum Supp.), Article 27, § 123) (emphasis in *Galloway*).

[31] *Id.*, 365 Md. at 608 n 4, 781 A 2d at 856 n 4

activity.[32] Additionally, the court employed a narrowing construction by reading a "reasonable person" standard into the statute.[33] Further, the court found that the presence of a specific intent requirement, though it might not be able by itself to save a statute from constitutional infirmity, helped to ensure that an accused had fair notice that he was violating a criminal statute.[34] The court also quoted from a Connecticut case for the proposition that its harassment statute did not implicate overbreadth concerns under the First Amendment because the "prohibition is against purposeful harassment by means of a device readily susceptible to abuse as a constant trespasser upon our privacy."[35]

3. *Comparison with Other Statutes*

The harassment provision before us lacks most of the restrictions found in the statutes that were analyzed in *Bowker* and *Galloway*. The portion of the statute at issue does not require that the calls be

---

[32] *Id.*, 365 Md. at 619, 781 A.2d at 862

[33] *Id.*, 365 Md. at 620, 781 A.2d at 863.

[34] *Id.*, 365 Md. at 632-33, 781 A.2d at 870-71.

[35] *Id.*, 365 Md. at 641-42, 781 A.2d at 876 (quoting *Connecticut v. Snyder*, 49 Conn. App. 617, 625, 717 A.2d 240, 243-44 (Conn. App. Ct. 1998) (in turn quoting *Connecticut v. Anonymous*, 34 Conn. Supp. 689, 696, 389 A.2d 1270, 1273-74 (Conn. Super. Ct. 1978)))

anonymous.[36] Although the Texas statute proscribes "repeated" communications, it does not require a showing that these communications were pursuant to a course of conduct. No exception is made for the expression of political views or the dissemination of information, and no reasonable warning to desist is required before further conduct triggers prosecution. Furthermore, the Texas statute does not contain a "reasonable person" standard.[37] And though specific intent is required by the Texas provision, that specific intent can attach to low intensity emotional states (annoy, alarm, embarrass).

4. *Low Intensity versus High Intensity Emotional States*

As we said in *Long*, "The First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed."[38] The

---

[36] A portion of the statute does proscribe anonymous calls, *see* TEX. PENAL CODE § 42.07(a)(4), but that part of the statute was not relied upon in this prosecution, and I express no opinion about it.

[37] *Long*, 931 S.W.2d at 289-90 ("reasonably likely" language in the former stalking provision did not codify a reasonable person standard).

[38] *Id.* at 290 n. 4. The Supreme Court has recently suggested that whether an actor has a particular intent is a "true-or-false determination," not a "subjective judgment" that would render a statute vague. *See Ex parte Ellis*, 309 S.W.3d 71, 89-90 (Tex.Crim.App. 2010) (quoting *Williams*, 553 U.S. at 306). In

(Continued on following page)

same could be said of the intent to alarm or embarrass. An intent to inflict one of these low intensity emotional states on the listener, even in the context of a telephone conversation, could easily be part of a legitimate communication protected by the First Amendment. A constituent might call his congressman to express a grievance, and annoying that congressman may be part of a legitimate attempt to spur him to act on that grievance. Political phone calls could be made to the homes of prospective voters with the intent to alarm those voters about a candidate's opponent[39] or about a particular government policy. A concerned neighbor or jilted lover might hope to embarrass a husband engaged in an extramarital affair by leaving a message on his answering machine for the wife to hear. Any of these behaviors might be criminal if the caller calls twice.

On the other hand, no one has the right to intentionally harass, abuse, or torment other people over a telephone. Specific intent is a limited mental state that is distinctly narrower than the mental states of knowledge and recklessness.[40] The statute requires

---

Long, we recognized that even if "intent to annoy, alarm, etc." was clear, a statute could still "run into a serious overbreadth problem." *Long*, 931 S.W.2d at 290 n.4.

[39] This observation was made by the court of appeals below. *See Scott*, 298 S.W.3d at 270.

[40] *See Stewart v. State*, 240 S.W.3d 872, 873-74 (Tex. Crim. App. 2007) (overturning tampering with evidence prosecution because, even if the defendant *knew* that his action would impair the availability of marijuana as evidence, the

(Continued on following page)

that the caller intend to harass, abuse, or torment the recipient of the call, not merely that the caller know or suspect that his call may have that effect. Moreover, the telephone is a comparatively personal and private method of communication in which messages can be difficult to screen. As the *Galloway* court explained, it is "a device readily susceptible to abuse" by a person who intends to be "a constant trespasser upon our privacy." When the intent of the actor is to inflict one of the higher-intensity emotional states of harass, abuse, and torment in the relatively private, "captive-audience" telephone context, and the actor's conduct is reasonably likely to achieve that end, the First Amendment provides no protection.

E. "Sole" Intent

Consequently, I would hold that the harassment provision at issue implicates the First Amendment with respect to the terms "annoy," "alarm," "embarrass," and "offend," but does not implicate the First Amendment with respect to the terms "harass," "abuse," and "torment." The Court contends that the entire statute is outside the purview of the First Amendment because "in the usual case, people whose conduct violates § 42.07(a)(4) will not have an intent to engage in legitimate communications of ideas, opinion, or information; they will have only the intent

---

prosecution had not shown that he *intended* to impair its availability)

to inflict emotional distress for its own sake."[41] But nothing in the statute limits its application to those occasions when the actor's sole intent is to inflict emotional distress, and if the court is implying that situations are rare in which a person has more than one intent, I disagree. The mischief this statute can create is enormous, as some of the hypotheticals given above illustrate.

And it is not feasible to graft "sole intent" onto the harassment statute as a narrowing construction. As I have explained, a court has a general duty to employ reasonable narrowing constructions to avoid constitutional violations, but it may not assume the legislative prerogative and rewrite a statute that is not readily subject to being narrowly construed.[42] The Legislature can legitimately punish a person who intentionally harasses, abuses, or torments someone over the telephone even if that is not the person's sole intent. One can easily imagine an ex-boyfriend hounding someone over the telephone with the intent to harass, abuse, or torment, but also having a particular grievance, real or imagined, to communicate. Such actors still deserve to be punished and are legitimately covered by the statute. When intentionally harassing, abusing, and tormenting conduct is occurring over the telephone, the authorities should not have to refrain from acting because the caller has

---

[41] Court's op at 10.

[42] *Long*, 931 S W 2d at 295.

or might have another reason for the call. Moreover, at trial the State would be saddled with proving "sole intent." A "sole intent" narrowing construction would do more to undermine the statute than simply severing (with respect to the part of the statute at issue) the problematic terms "annoy," "alarm," "embarrass," and "offend."[43] And finally, there is no basis in the statute for applying a "sole intent" construction only to the emotional states of "annoy," "alarm," and "embarrass." The Supreme Court has explained that a party "give[s] the game away" when he argues that an intent requirement applies in some circumstances but not others if there is no basis whatever in the text for doing so.[44] The Supreme Court stated that, though it "will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute."[45]

---

[43] Indeed, one can wonder whether a "sole intent" narrowing construction would destroy the statute in an attempt to save it because virtually every defendant would claim to have some other intent in addition to an intent to inflict emotional distress

[44] *Holder v Humanitarian Law Project*, 130 S. Ct. at 2718 ("Finally, plaintiffs give the game away when they argue that a specific intent requirement should apply only when the material-support statute applies to speech There is no basis whatever in the text of § 2339B to read the same provisions in that statute as requiring intent in some circumstances but not others ").

[45] *Id*

F. Spoken Words

The Court also says that the text of harassment statute "does not require that the actor use spoken words."[46] The portion of the statute at issue here proscribes "telephone communications."[47] Although someone may use a "telephone communication" for something other than words (e.g. silence or heavy breathing), the portion of the statute at issue here overwhelmingly implicates the spoken word. For example, ringing the phone repeatedly is proscribed by a part of the statute not at issue here.[48] Moreover, although words are not required, that fact would not distinguish this case from *Long,* in which First Amendment freedoms were found to be implicated by the stalking statute.[49]

For the above reasons, I respectfully dissent.

Filed: October 6, 2010

Publish

---

[46] Court's op. at 9.

[47] *See* TEX. PENAL CODE § 42.07(a)(4), quoted in this opinion, *ante*.

[48] *See* TEX. PENAL CODE § 42.07(a)(4).

[49] *See* this opinion, *ante*.

Samuel SCOTT,
Appellant
v.
The STATE of Texas,
Appellee

Nos. 04-08-00501-CR & 04-08-00502-CR

COURT OF APPEALS OF TEXAS,
FOURTH DISTRICT, SAN ANTONIO

298 S.W.3d 264; 2009 Tex. App. LEXIS 4726

June 24, 2009, Delivered
June 24, 2009, Filed

COUNSEL: For APPELLANT: Donald H. Flanary, III, Goldstein, Goldstein and Hilley, San Antonio, TX.

For APPELLEE: Helen Petry, Assistant Criminal District Attorney, San Antonio, TX.

JUDGES: Opinion by: Karen Angelini, Justice. Sitting: Karen Angelini, Justice, Sandee Bryan Marion, Justice, Phylis J. Speedlin, Justice.

OPINION BY: Karen Angelini

OPINION

REVERSED AND RENDERED

At issue in this appeal is whether subsections (a)(4) and (7) of the harassment statute are unconstitutionally vague. Because we hold that subsections (a)(4) and (7) are unconstitutionally vague on their

face, we reverse the trial court's judgments and render judgments of acquittal.

BACKGROUND

In two separate cases, Samuel Scott was charged by information with harassing his former wife. He filed motions to quash, arguing that subsections (a)(4) and (7) of the harassment statute are unconstitutionally vague and overbroad. The trial court denied the motions to quash, and Scott then entered a conditional plea of nolo contendere. In each case, Scott was sentenced to two days in jail and a fifty dollar fine. He appeals, arguing that the trial court should have granted his motions to quash because the harassment statute is unconstitutionally vague and overbroad.

INFORMATION

In Trial Court No. 963428, Scott was charged by information with committing harassment:

> [O]n or about the 5th Day of December, 2005, SAMUEL SCOTT, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did MAKE REPEATED COMMUNICATIONS TO THE COMPLAINANT, to wit: telephone calls, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE,

> TORMENT, EMBARRASS, AND OFFEND THE COMPLAINANT.

In Trial Court No. 972642, Samuel Scott was also charged by information with committing harassment:

> [O]n or about the 12th Day of March, 2006, SAMUEL SCOTT, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did MAKE REPEATED TELEPHONE COMMUNICATIONS TO THE COMPLAINANT IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, AND OFFEND THE COMPLAINANT; to wit: the defendant called the complainant repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail messages.

TEXAS HARASSMENT STATUTE

Subsections (a)(4) and (7) of the harassment statute, which is codified in section 42.07 of the Texas Penal Code, provide the following:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he: . . .
>
> > (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to

> harass, annoy, alarm, abuse, torment, embarrass, or offend another; . . . or
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

TEX. PENAL CODE ANN. § 42.07(a)(4), (7) (Vernon 2003). An "electronic communication" is defined as the following:

> (1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:
>
> (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and
>
> (B) a communication made to a pager.

Id. § 42.07(b)(1).

The information in Trial Court No. 963428 alleges that Scott violated section 42.07(a)(4) by making repeated telephone calls to the complainant in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend the complainant. The information in Trial Court No. 972642 alleges that Scott, while intoxicated, repeatedly called the complainant by telephone and left "abusive and harassing voice mail messages" late at night in a

manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend the complainant. Because voice mail messages clearly fall within the definition of "electronic communications," Scott argues that in addition to subsection (a)(4), he was also charged with violating subsection (a)(7). We agree that voice mail messages fall within "electronic communications." Therefore, we will analyze whether subsections (a)(4) and (7) are unconstitutionally vague.

VAGUENESS

Scott argues that subsections (a)(4) and (7) are void for vagueness on their face in violation of the First and Fourteenth Amendments to the United States Constitution.[1] Specifically, Scott argues that subsections (a)(4) and (7)'s phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another" is unconstitutionally vague because "[i]t is impossible for a citizen to know what, in the disjunctive, is meant by this statue's series of vague terms." According to Scott,

---

[1] Scott also argues that the harassment statute is unconstitutionally vague in violation of Article 1, section 8 of the Texas Constitution. Scott, however, does not explain how the Texas Constitution provides more protection than the United States Constitution. Therefore, to the extent that the Texas Constitution does provide more protection than the United States Constitution, Scott has inadequately briefed the issue. *See* TEX R APP. P. 38.1(h).

"[t]hese terms are susceptible to uncertainties of meaning, and because the statute does not establish clear standards for whose sensibilities are to be offended, it is unconstitutionally vague." Similarly, Scott argues that subsections (a)(4) and (7)'s prohibition of "repeated" communications is unconstitutionally vague "because the statute does not define how many communications are prohibited or the period of time over which such communications are not to occur."

A. Standard of Review

When reviewing the constitutionality of a statute, we presume that the statute is valid and that the legislature acted reasonably in enacting the statute. *Rodriguez v. State,* 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). The person challenging the statute must prove its unconstitutionality. *Id.*

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). "Vague laws offend several important values." *Id.* "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* "Vague laws may trap the innocent by not providing fair warning." *Id.* "Second, if arbitrary and discriminatory enforcement

is to be prevented, laws must provide explicit standards for those who apply them." *Id.* "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. "Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Id.* at 109 (quotations omitted). "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* (quotations omitted). Thus, for a statute not to be unconstitutionally vague, it must be sufficiently clear in at least three respects: (1) a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited; (2) the law must establish determinate guidelines for law enforcement; and (3) if First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. *Id.* at 108-09; *Long v. State,* 931 S.W.2d 285, 287 (Tex. Crim. App. 1996).

B. Are First Amendment freedoms implicated?

We first note that if First Amendment freedoms are not implicated, Scott must show that subsections (a)(4) and (7) are unconstitutional as applied to his conduct. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) (explaining that to

challenge the vagueness of a law that does not reach constitutionally protected conduct, a person must first show the law is unconstitutionally vague as applied to him because a person "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others"); *Bynum v. State*, 767 S.W.2d 769, 773-74 (Tex. Crim. App. 1989) (explaining that when First Amendment rights are not implicated, a court must first consider whether the statute is impermissibly vague as applied to the challenging party's specific conduct). However, if First Amendment freedoms are implicated, then Scott may bring only a facial challenge to the statute. That is, "[t]he vagueness doctrine requires different levels of clarity depending on the nature of the law in question." *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998). "Courts demand less precision of statutes that impose only civil penalties than of criminal statutes because their consequences are less severe." *Id.* (citing *Village of Hoffman Estates*, 455 U.S. at 498-99). "However, when the statute's language is capable of reaching protected speech or otherwise threatens to inhibit the exercise of constitutional rights, a stricter vagueness standard applies than when the statute regulates unprotected conduct." *Id.* at 438 (citing *Village of Hoffman Estates*, 455 U.S. at 497). Thus, "[w]hen speech is at stake," allowing a defendant to raise a facial vagueness challenge without showing the statute is vague as applied to his conduct, is "justified since the otherwise continued existence of the statute in unnarrowed form

would tend to suppress constitutionally protected rights." *Id.* (quoting *Gooding v. Wilson,* 405 U.S. 518, 521, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)). Thus, we must decide whether subsections (a)(4) and (7) have "the potential to chill some protected expression if [they] do[ ] not define what is prohibited with sufficient clarity." *Id.*

We hold that subsections (a)(4) and (7) do implicate First Amendment freedoms. What is "annoying," "embarrassing," or even "alarming" may be protected speech. For example, political calls made repeatedly during election season could fall under subsection (a)(4) if the caller is intending to alarm the recipient concerning a particular candidate. Further, we note that subsection (a)(7)'s "electronic communications" could encompass some talk radio and television programming.

We note that the State argues that no First Amendment freedoms are implicated because there is no authority supporting the proposition that making harassing telephone calls is a constitutionally protected right under the First Amendment. Indeed, some courts have held that harassment, although it may take the form of speech, is not protected speech under the First Amendment and is not "communication." *See Park v. State,* No. 03-04-00760-CR, 2006 Tex. App. LEXIS 7083, 2006 WL 2309595, at *2 (Tex. App. – Austin 2006, no pet.) ("Prohibiting harassment is not prohibiting speech because harassment is not protected speech.") (not designated for publication); *see also Test Masters Educ. Servs. v. Singh,* 428 F.3d

559, 580 (5th Cir. 2005) ("Courts have made a distinction between communication and harassment. The difference is one between free speech and conduct that may be proscribed. Although restrictions based upon conduct may incidentally restrict speech, the courts have found that such a restriction poses only a minimal burden on speech."). The Austin Court of Appeals, the Fourteenth Court of Appeals, and the Dallas Court of Appeals have all held that section 42.07(a)(4) does not implicate the First Amendment. *See Park*, 2006 Tex. App. LEXIS 7083, 2006 WL 2309595, at *3 ("Appellant has not shown that making repeated telephone calls with an intent to harass another is a constitutionally protected activity, and we have already held that such conduct is not constitutionally protected."); *DeWillis v. State*, 951 S.W.2d 212, 217 (Tex. App. – Houston [14th Dist.] 1997, no pet.) ("[W]e find no authority supporting the proposition that causing another person's telephone to ring repeatedly or repeatedly making anonymous telephone calls is a constitutionally protected activity under the First Amendment."); *State v. Johns*, No. 05-97-00862-CR, 1998 Tex. App. LEXIS 5539, 1998 WL 549267, at *3 (Tex. App. – Dallas 1998, no pet.) (not designated for publication) ("We agree with the *DeWillis* court that a person who causes another person's telephone to ring repeatedly or repeatedly making anonymous telephone calls to another person is not a constitutionally protected activity under the First Amendment."). What these courts have, in essence, held is that the harassment statute cannot implicate the First Amendment because it prohibits

what it considers to be harassment. As explained recently by the Fort Worth Court of Appeals in *Karenev v. State*, 258 S.W.3d 210, 213 (Tex. App. – Fort Worth 2008), *rev'd on other grounds*, 281 S.W.3d 428 (Tex. Crim. App. 2009),[2] the problem with this argument "is that it is the challenged statute itself that defines harassment." "Unless the harassment statute is sufficiently clear to withstand constitutional scrutiny, no unlawful harassment exists that would be excluded from First Amendment protection." *Id.*

We note that in explaining that the First Amendment is not implicated, the Austin Court of Appeals has stated that subsection (a)(4) "does not criminalize telephone calls made with legitimate intentions to communicate and only prohibits calls specifically intended to 'harass, annoy, alarm, abuse, torment, or embarrass.'" *Park*, 2006 Tex. App. LEXIS 7083, 2006 WL 2309595, at *2. However, as stated earlier, we can envision a scenario where political phone calls are made with intent to "alarm" voters about a candidate's opponent.

---

[2] On April 22, 2009, the Texas Court of Criminal Appeals reversed the opinion by the Fort Worth Court of Appeals, holding that the court of appeals should never have reached the facial challenge to the harassment statute because Karenev did not make a facial challenge to the constitutionality of the statute in the trial court *Karenev v State*, 281 S W 3d 428, 429 (Tex Crim. App 2009) Thus, the court of criminal appeals held that "a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute." *Id.* at 434.

Further, we note that in *Long v. State*, 931 S.W.2d 285, 292 (Tex. Crim. App. 1996), the court of criminal appeals recognized that some courts from other jurisdictions had upheld statutes by construing them to punish conduct only when the actor's *sole* intent was to engage in conduct not protected by the First Amendment. Subsections (a)(4) and (7), however, do not limit the offense to a person with the *sole* intent to engage in conduct not protected by the First Amendment.

We, therefore, hold that subsections (a)(4) and (7) implicate First Amendment freedoms and will now turn to Scott's facial vagueness challenge to subsections (a)(4) and (7).

C. Are subsections (a)(4) and (7) unconstitutionally vague on their face?

Scott claims that the terms "annoy," "alarm," "abuse," "torment," and "embarrass" contained in subsections (a)(4) and (7) are unconstitutionally vague. Scott also argues that the term "repeated" communications, contained within both subsections, is unconstitutionally vague as well because it does not indicate how many communications are prohibited or the period of time over which such communications are not to occur. We agree.

1. Are the terms "annoy," "alarm," and "embarrass" unconstitutionally vague?

Scott argues that subsections (a)(4) and (7)'s prohibition on intending to "harass, annoy, alarm, abuse, torment, or embarrass another" by making communications "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another" is unconstitutionally vague because these terms are inherently vague. Scott emphasizes that subsections (a)(4) and (7) do not define an objective standard by which to measure what level of annoyance or alarm is prohibited. For support, he relies on *May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989), which held the pre-1983 harassment statute to be unconstitutional, and *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996), which held the "stalking" provision of the 1993 harassment statute to be unconstitutional. Scott argues that the current harassment statute still suffers from the same infirmities as those held to be unconstitutional in *May* and *Long*.

In response, the State argues that the terms contained in subsections (a)(4) and (7) are not vague because (1) a person must act with *intent to harass or annoy*; (2) there is a means prong that specifies this intentional harassment must be instigated by telephone communication; and (3) the phrase "reasonably likely" is an objective standard.

a. Do subsections (a)(4) and (7) contain a reasonable person standard?

With regard to the last argument, the State recognizes that *Long* held "reasonably likely" was not an objective standard. *Long*, 931 S.W.2d at 289-90. Nevertheless, the State argues that Long "warrants reconsideration." We, of course, cannot reconsider *Long*'s holding, as *Long* was decided by the Texas Court of Criminal Appeals.

In the alternative, the State argues that the lack of an objective standard is not necessarily fatal to a statute's constitutionality. Indeed, the *Long* court noted that "the absence of a reasonable person requirement is not necessarily fatal to the statute's constitutionality." *Long*, 931 S.W.2d at 290. The court explained that other provisions could sufficiently define an offense to avoid a vagueness problem. *Id.*

As an example, the court pointed to a Kentucky disorderly conduct statute addressed by the Supreme Court in *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972). *Long*, 931 S.W.2d at 290. According to that statute, a person was guilty of disorderly conduct if, with intent to annoy or alarm, a person congregated with other people in a public place and refused to comply with a lawful order of the police to disperse. *Long*, 931 S.W.2d at 290 (quoting *Colten*, 407 U.S. at 108). The court of criminal appeals explained that, in that context, "annoy" and "alarm" were not vague because a person would understand that he could be convicted under the

statute if he failed to obey an order to move on. *Id.* That is, "the refusal to comply with a lawful order to disperse, combined with an intent to annoy, rendered the statute sufficiently clear to defeat a vagueness challenge." *Id.* Here, however, subsections (a)(4) and (7) do not contain "other provisions" that would sufficiently define annoy and alarm.

b. Does the requirement that a person must act with intent to harass or annoy and a means prong requiring the conduct to be instigated by telephone save section 42.07(a)(4) from vagueness?

The State argues that even if section 42.07(a)(4) does not contain a reasonable person standard, it is still not unconstitutionally vague because it has a requirement that one must act with intent to harass or annoy and it has a means prong requiring the conduct to be instigated by telephone.

As noted previously, in *Long*, the court of criminal appeals held that even without a reasonable person standard, other provisions may sufficiently define a statute to avoid a vagueness problem. In looking at whether the Texas stalking statute had such other provisions, the court distinguished the Texas statute from the Kentucky statute in *Colten*, noting that "the stalking statute does not require that the predicate acts be related to each other in any fashion." *Long*, 931 S.W.2d at 291. "The absence of any nexus between the threat requirement in (a)(7)(B) and the conduct requirement in (a)(7)(A)

strongly supports viewing the two subsections separately and requiring each to pass constitutional muster on its own." *Id.* "The lack of any connection between the predicate acts distinguishes the present case from *Colten*." *Id.* The court noted that the statute in *Colten* involved two elements of conduct: (1) congregating in a public place, and (2) refusing to comply with a lawful order to disperse. *Id.* at 291-92. "Both of these elements of conduct involve what is in essence a single act: a gathering of people who refuses to disperse." *Id.* at 292. The court then went on to examine decisions from other jurisdictions, noting harassment statutes that had been upheld contained some sort of a "nexus requirement." *Id.* For example, an Illinois statute required a threat and relevant conduct in *furtherance of the threat*. *Id.* Other states had required the conduct show a "continuity of purpose." *Id.*

Subsections (a)(4) and (7), however, are not like the Kentucky statute in *Colten*. Section 42.07(a)(4)'s requirement that communication be instigated by telephone, even combined with the intent to annoy or alarm requirement, does not sufficiently render the statute sufficiently clear to defeat a vagueness challenge. Unlike in *Colten*, there is no clear order, like the one to disperse, from which one would know he is breaking the law.

In *Long*, 931 S.W.2d at 292, the court of criminal appeals also explained all the statutes that had been upheld contained "additional limiting elements not found in the Texas criminal statute." *Id.* at 293. "Many limit the vagueness of the conduct described

by linking it to more specific conduct through a continuity of purpose requirement." *Id.* "Others tie the conduct together with a more specific mental state than a mere intent to annoy, such as intent to place in fear of bodily injury, or with a more intense mental state, such as intent to frighten." *Id.* "In addition to creating greater specificity, these kinds of limiting elements help to avoid a vagueness problem by taking the First Amendment out of the picture." *Id.* Conduct that alone would constitute protected activities may be actionable if it is part of a common plan that includes activity that is clearly unprotected. *Id.* "And, while conduct does not lose First Amendment protection because the actor intends to annoy the recipient, such conduct is much less likely to enjoy protection where the actor intends to 'frighten' the recipient, and such conduct is unlikely to enjoy any protection where the actor intends to place the recipient in fear of death or bodily injury." *Id.* "If the First Amendment can be removed from the arena, a stalking statute can be evaluated under more deferential due process standards, and is thus more likely to survive scrutiny." *Id.*

The court then explained that the threat requirement in the Texas stalking statute did not successfully remove the First Amendment from the purview of the offense. *Id.* "In the absence of any nexus between the threat requirement and the conduct requirement, there is a real likelihood that the statute could chill the exercise of protected First Amendment expression." *Id.* "If the threat is the first predicate act, then any future conduct that is

annoying (or harassing, alarming, etc.) could trigger the application of the statute – so long as both predicate acts were directed at the same person – even though the second predicate act consists entirely of protected First Amendment activity." *Id.* "This situation in essence holds protected activity hostage once a person engages in one proscribed act that is not protected." *Id.* The court then gave the following example: "a political protester who crosses the line and makes a threat might find himself forever barred from engaging in peaceful and legitimate expression for fear of subjecting himself to punishment for stalking." *Id.* "The legislature may legitimately punish the threat, but it should not be permitted to hold someone's First Amendment rights forever hostage after he makes such a threat." *Id.* at 293-94.

We fail to see how subsection (a)(4)'s requirement that the communication be instigated by telephone, even if combined with the requirement that a person have intent to annoy, alarm, or embarrass, creates a sufficient nexus to overcome the vagueness problem. Nor does such a requirement "successfully remove the First Amendment from the purview of the offense." *Id.* at 293. We, therefore, hold that the phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another" contained within subsections (a)(4) and (7) is unconstitutionally vague on its face.

2. Is the term "repeated" unconstitutionally vague?

Scott also argues that subsections (a)(4) and (7)'s prohibition of "repeated" communications is unconstitutionally vague because the statute does not define how many communications are prohibited or over what time period the communications are not to be made. We agree that the term "repeated" is unconstitutionally vague because the statute does not indicate the requisite frequency of the repeated communications. *Karenev,* 258 S.W.3d at 217-18. Does "repeated" "mean that if a person sends three annoying emails over a five-year period, the person is guilty of the offense of harassment?" *Id.* "Can we tell from the statute?" *Id.* at 218. One could make three phone calls over ten years and technically fall under subsections (a)(4) and (7). Therefore, we hold that the term "repeated" contained within subsections (a)(4) and (7) is unconstitutionally vague.[3]

CONCLUSION

We hold that subsections (a)(4) and (7) are unconstitutionally vague and, therefore, reverse the trial court's judgments and render judgments of acquittal.

Karen Angelini, Justice
Publish

---

[3] Having held that subsections (a)(4) and (7) are unconstitutionally vague, we need not reach Scott's other issues

Vernon's Texas Statutes and Codes Annotated

Penal Code (Refs & Annos)

Title 9. Offenses Against Public Order and Decency

Chapter 42. Disorderly Conduct and Related Offenses (Refs & Annos)

V.T.C.A., Penal Code § 42.07

§ 42.07. Harassment

Effective: September 1, 2001

Currentness

(a) A person commits an offense if, with intent to **harass**, annoy, alarm, abuse, torment, or embarrass another, he:

(1) initiates communication by telephone, in writing, or by electronic communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;

(2) threatens, by telephone, in writing, or by electronic communication, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of his family or household, or his property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass,

annoy, alarm, abuse, torment, embarrass, or offend another;

(5) makes a telephone call and intentionally fails to hang up or disengage the connection;

(6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section; or

(7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

(b) In this section:

(1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:

(A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and

(B) a communication made to a pager.

(2) "Family" and "household" have the meaning assigned by Chapter 71, Family Code.

(3) "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

(c) An offense under this section is a Class B misdemeanor, except that the offense is a Class A misdemeanor if the actor has previously been convicted under this section.

NO. 963428

STATE OF TEXAS	§	**IN THE COUNTY COURT**
vs.	§	**AT LAW NUMBER 7**
SAM SCOTT	§	**BEXAR COUNTY, TEXAS**

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Sam Scott, Defendant in the above styled and numbered cause and moves that this case be set Dismissed by virtue of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 8, 10 and 19 of the Texas Constitution, Articles 1.05, 21.01, 21.02, 21.03, 21.04, 21.05, 21. 11 and 21.19 of the Texas Code of Criminal Procedure, and Sections 1.07, 6.02 and 6.03 of the Texas Penal Code for the following reasons:

STATUE IS UNCONSTITUTIONAL

The Defendant is charged by information, with the offense of Telephone Harassment in violation of Texas Penal Code Section 42.07. This statute is facially unconstitutional void for vagueness and overbroad. *Karenev v State,* 2008 WL 902799, April 3, 2008, *Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). [First and Fourteenth Amendments to the U.S. Const., *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126 (1926), *Connally, Lanzetta v. State of New Jersey,* 306 U.S. 451 (1939) and *Sheldon v.*

State, 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed)]; and,

The Defendant is charged with Telephone Harassment and Electronic Communications Harassment. This statute has been held unconstitutionally vague because "a person of ordinary circumstances cannot tell what is prohibited and what is not." *Karenev v State,* 2008 WL 902799, April 3, 2008 *also see Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). The Court of Criminal Appeals in *Long* stated:

> "It is well-established that criminal laws must be sufficiently clear in at least three respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. Second, the law must establish determinate guidelines for law enforcement. Finally, where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness 'demands a greater degree of specificity than in other contexts.'" Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Moreover, when a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though

it may not be unconstitutional as applied to the defendant's conduct." *id.*

A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Statutes and regulations must be reasonably certain to avoid vagueness that might otherwise induce individuals to forgo First Amendment rights for fear of violating an unclear law. *See Scull v. Commonwealth of Virginia*, 359 U.S. 344, 353, 79 S.Ct. 838, 3 L.Ed.2d 865 (1959). Therefore, a law must be narrowly drawn when First Amendment rights are implicated to prevent the undue constraint of such rights under the guise of regulating conduct by police power. *See Ashton v. Kentucky*, 384 U.S. 195, 200-01, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966). Otherwise, there is the risk that a vague law will cause individuals to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)).

The First Amendment protects people from vague penal statutes. *See Connally, Lanzetta v. State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976), *Smith v.*

Goguen, 415 U.S. 566, 571, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), *Coates v. City of Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), and *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The statutes considered in each of these cases were unconstitutional because vague terms encompassed not only the impermissible conduct, but also constitutionally-protected conduct, such as free speech and free association, chilling the exercise of those freedoms and lending themselves "to harsh and discriminatory enforcement by local prosecuting officials." *Thornhill,* 310 U.S. at 97-98, 60 S.Ct. 736; *see also Coates,* 402 U.S. at 615, 91 S.Ct. 1686 (concerning free assembly); *Gooding* 405 U.S. at 519-20, 92 S.Ct. 1103 (involving criminal liability for using abusive language); *Smith,* 415 U.S. at 571-72, 94 S.Ct. 1242 (penalizing flag misuse); *Hynes,* 425 U.S. at 611, 620, 96 S.Ct. 1755 (preventing door-to-door solicitation); *Grayned,* 408 U.S. at 108, 92 S.Ct. 2294 (holding that anti-noise ordinance was not overly vague); *Lanzetta,* 306 U.S. at 458, 59 S.Ct. 618 (criminalizing being a "gangster"); *Connally,* 269 U.S. at 393, 46 S.Ct. 126 (penalizing for not paying certain wage rates).

A statute is overly-broad under the First Amendment if the terms of the challenged statute are broad enough to suppress legitimately protected First Amendment rights. *Gooding v. Wilson,* 405 U.S. 518, 522, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The overbreadth doctrine permits the facial invalidation

of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial, judged in relation to the statute's legitimate sweep. *See City of Chicago v. Morales,* 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 612-15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). To attack a statute on overbreadth grounds, one must show either that every application of the statute creates an impermissible risk of the suppression of ideas, or that the statute is "substantially" overbroad, meaning there is a realistic danger that the statute itself will significantly compromise First Amendment protections of third parties. *See New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); *City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797-99, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

The court should dismiss the prosecution of the defendant. The trial court has the authority to dismiss the prosecution. *See State v. Gray,* 801 S.W.2d 10, 11 (Tex. App. – Austin 1990); *Smith v. State,* 801 S.W.2d 629, 631 n.1 (Tex. App. – Dallas 1991); T.C.C.P. Art. 28.05.

PRAYER

WHEREFORE, premises considered, the defendant prays that the Court dismiss the above-numbered and entitled cause and for such other relief that this Honorable Court deems just and right.

Respectfully submitted,
Goldstein, Goldstein, and Hilley
310 South St. Mary's Street
Suite 2900
San Antonio, Texas 78205
Tel: (210) 226-1463
Fax: (210) 226-8367

By: _____
Donald H. Flanary, III
State Bar No. 24054877
Attorney for Sam Scott

CERTIFICATE OF SERVICE

This is to certify that on June 25, 2008, a true and correct copy of the above and foregoing document was served on the Bexar County District Attorney's Office, San Antonio, Texas, by hand delivery.

_____
Donald H. Flanary, III

NO. 963428

STATE OF TEXAS	§	**IN THE COUNTY COURT**
vs.	§	**AT LAW NUMBER 7**
SAM SCOTT	§	**BEXAR COUNTY, TEXAS**

ORDER

On _____, 2008, came on to be considered Sam Scott's Motion to Dismiss, and said motion is hereby

(Granted) (Denied)

_____
JUDGE PRESIDING

NO. 963428

STATE OF TEXAS	§	**IN THE COUNTY COURT**
vs.	§	**AT LAW NUMBER 7**
SAM SCOTT	§	**BEXAR COUNTY, TEXAS**

MOTION TO QUASH THE INFORMATION
Defective Substance

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Sam Scott, Defendant in the above styled and numbered cause and moves that the information filed in this case be set aside by virtue of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 8, 10 and 19 of the Texas Constitution, Articles 1.05, 21.01, 21.02, 21.03, 21.04, 21.05, 21. 11 and 21.19 of the Texas Code of Criminal Procedure, and Sections 1.07, 6.02 and 6.03 of the Texas Penal Code for the following reasons:

SUBSTANCE OF INFORMATION IS DEFECTIVE

The Defendant is charged by information, with the offense of Telephone Harassment in violation of Texas Penal Code Section 42.07. The substance of the indictment is defective and should be set aside for the two following fundamental reasons:

(1) the information alleges a statutory offense that is facially unconstitutional in that it is void for

vagueness and overbroad. *Karenev v State,* 2008 WL 902799, April 3, 2008, *Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). [First and Fourteenth Amendments to the U.S. Const., *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126 (1926), *Connally, Lanzetta v. State of New Jersey,* 306 U.S. 451 (1939) and *Sheldon v. State,* 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed)]; and,

(2) the information fails to allege all of the elements necessary to prove an offense, [Fifth and Sixth Amendments to the U.S. Const., Art. 1 Sec 19 of the Texas Const. and, T.C.C.P. Art. 21.03].

The Code of Criminal Procedure categorizes errors in a charging instrument as either defects of substance or defects of form. *See* T.C.C.P Arts. 27.08 and 27.09. A defect of substance goes to the essence of the allegation of the offense. The defects of substance that may be raised in a motion to quash are: (1) that the information fails to charge an offense [T.C.C.P Art 27.08] and (2) that the statutory offense alleged is facially unconstitutional. *See Sheldon v. State,* 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed) (claim that a statute is void for vaguenss on its face may be presented in a motion to quash.)

Statute Alleged is Facially Unconstitutional
Statue Vague and Overbroad

The offenses of Telephone Harassment and Electronic Communications Harassment as defined in Texas Penal Code Section 42.07(a) is unconstitutional

on its face in that it is vague and overbroad, and violates the First Amendment of the United States Constitution.

It is well settled that an indictment may be quashed if the statute creating the offense charged is unconstitutional. Therefore, a motion to quash is one means of testing the validity of a statute which is potentially unconstitutional. *White v. State,* 440 S.W. 2d 660, 667 (Crim. App. 1969). Furthermore, a charging instrument may not be amended if the trial court has set it aside on the grounds that the underlying statute is unconstitutional. *State v. Evans,* 800 S.W.2d 220, 225 (Crim. App. 1990).

The Defendant is charged with Telephone Harassment and Electronic Communications Harassment. This statute has been held unconstitutionally vague because "a person of ordinary circumstances cannot tell what is prohibited and what is not." *Karenev v State,* 2008 WL 902799, April 3, 2008 *also see Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). The information should likewise be quashed because the manner and means are unconstitutionally vague. The Court of Criminal Appeals in *Long* stated:

> "It is well-established that criminal laws must be sufficiently clear in at least three respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. Second, the law must establish determinate guidelines for law enforcement. Finally, where First Amendment freedoms are implicated,

> the law must be sufficiently definite to avoid chilling protected expression. "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness 'demands a greater degree of specificity than in other contexts.'" Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Moreover, when a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct." *id.*

A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Statutes and regulations must be reasonably certain to avoid vagueness that might otherwise induce individuals to forgo First Amendment rights for fear of violating an unclear law. *See Scull v. Commonwealth of Virginia,* 359 U.S. 344, 353, 79 S.Ct. 838, 3 L.Ed.2d 865 (1959). Therefore, a law must be narrowly drawn when First Amendment rights are implicated to prevent the undue constraint of such rights under the guise of regulating conduct by police power. *See Ashton v. Kentucky,* 384 U.S. 195, 200-01, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966). Otherwise, there is the risk that a vague law will cause individuals to "'steer far wider

of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)).

The First Amendment protects people from vague penal statutes. *See Connally, Lanzetta v. State of New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), *Grayned v. City of Rockford,* 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), *Hynes v. Mayor & Council of Borough of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976), *Smith v. Goguen,* 415 U.S. 566, 571, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), *Coates v. City of Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), and *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The statutes considered in each of these cases were unconstitutional because vague terms encompassed not only the impermissible conduct, but also constitutionally-protected conduct, such as free speech and free association, chilling the exercise of those freedoms and lending themselves "to harsh and discriminatory enforcement by local prosecuting officials." *Thornhill,* 310 U.S. at 97-98, 60 S.Ct. 736; *see also Coates,* 402 U.S. at 615, 91 S.Ct. 1686 (concerning free assembly); *Gooding* 405 U.S. at 519-20, 92 S.Ct. 1103 (involving criminal liability for using abusive language); *Smith,* 415 U.S. at 571-72, 94 S.Ct. 1242 (penalizing flag misuse); *Hynes,* 425 U.S. at 611, 620, 96 S.Ct. 1755 (preventing

door-to-door solicitation); *Grayned,* 408 U.S. at 108, 92 S.Ct. 2294 (holding that anti-noise ordinance was not overly vague); *Lanzetta,* 306 U.S. at 458, 59 S.Ct. 618 (criminalizing being a "gangster"); *Connally,* 269 U.S. at 393, 46 S.Ct. 126 (penalizing for not paying certain wage rates).

A statute is overly-broad under the First Amendment if the terms of the challenged statute are broad enough to suppress legitimately protected First Amendment rights. *Gooding v. Wilson,* 405 U.S. 518, 522, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial, judged in relation to the statute's legitimate sweep. *See City of Chicago v. Morales,* 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 612-15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). To attack a statute on overbreadth grounds, one must show either that every application of the statute creates an impermissible risk of the suppression of ideas, or that the statute is "substantially" overbroad, meaning there is a realistic danger that the statute itself will significantly compromise First Amendment protections of third parties. *See New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); *City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797-99, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

The information in this case should be set aside for being unconstitutionally vague and overbroad. If the court so finds, then the information should not be amended. A charging instrument may not be amended if the trial court has set it aside on a ground that the underlying statute is unconstitutional. *See State v. Eaves,* 800 S.W.2d 220, 224 (Crim. App. 1990).

The court should dismiss the prosecution of the defendant. On granting a motion to quash the charging instrument, the trial court has the authority to dismiss the prosecution. *See State v. Gray,* 801 S.W.2d 10, 11 (Tex. App. – Austin 1990); *Smith v. State,* 801 S.W.2d 629, 631 n.1 (Tex. App. – Dallas 1991); T.C.C.P. Art. 28.05. If the exception to the indictment is sustained on the ground it fails to charge an offense, the defendant should be discharged. *See* T.C.C.P. Art 28.07.

Failure to Allege Elements of an Offense

In order to state an offense, an indictment must allege each and every element of the offense. T.C.C.P. Art. 21.03; *Ex parte Winton,* 549 S.W.2d 751, 752 (Crim. App. 1977). There is no exception to the substance of an indictment if it does not appear there from that an offense against the law was committed by the defendant. T.C.C.P Art. 27.08. The Texas Penal Code defines "element of offense" as: "(A) the forbidden conduct; (B) the required culpability; (C) any required result; and (D) the negation of any exception

to the offense" Tex. Pen. Code Sec. 1.07(a)(22); *Holly v. State,* 167 S.W.3d 546, 548 (Tex. App. – Houston [14th Dist.] 2005, no pet.) The indictment against the Defendant fails to allege two fundamental and independent elements of the offense prohibited in Transportation Code Section 545.420 of which the Defendant is charged.

The information against the defendant fails to allege an offense against the laws of the state of Texas because it fails to allege indispensable elements of an offense. The information fails to allege an offense in two regards, (1) it fails to allege that the defendant committed an offense with the requisite mental state and (2) it fails to allege all elements of the offense. The information's failure to allege elements of the offense violate the Defendant's state and federal constitutional rights to Due Process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 10 and 19 of the Texas Constitution.

No Culpable Mental State Alleged

The information fails to allege a culpable mental state. Criminal offenses require a culpable mental state. Where the particular mental state required is not set forth in the Code section defining the offense and the statutory definition does not plainly dispense with the mental element, the applicable culpable mental state is found by reference to a general statute. *See* Tex. Pen. Code Sec. 6.02 and 6.03. The Texas

Penal Code's Section 6.02 *Requirement of Culpability* states that "a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires." Accordingly, "if the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." Texas Code of Criminal Procedure Article 21.05 mandates that "[w]here a particular intent is a material fact in the description of the offense, it must be stated in the indictment." Thus, where a culpable mental state is required, the state's failure to plead it is a defect in the indictment. *See* T.C.C.P. Art. 21.05; *Ex parte Winton,* 549 S.W.2d 751, 752 (Crim. App. 1977); *Baldwin v. State*, 538 S. W.2d 109, 112 (Tex. Crim. App. 1976); *Ex parte Rodgers,* 589 S.W.2d 751 752 (Crim. App. 1979) (failure to allege requirement of culpable mental state for offense of failing to stop and render aid made the indictment fundamentally defective.)

The information alleges that the Defendant committed the offense in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant. This language has been held to be unconstitutionally vague. *See Karenev v State,* 2008 WL 902799, April 3, 2008, and *Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996).

Again, the Court of Criminal Appeals in *Long* stated that must be sufficiently clear that a person of ordinary intelligence must be given a reasonable

opportunity to know what is prohibited, that the law must establish determinate guidelines for law enforcement, and that where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression.

The failure of the information to allege an essential element of the offense, namely the required culpable mental state, prevents the Defendant from understanding the nature of the charges against him and denies him the ability to prepare an adequate defense. The Defendant's inability understand the nature of the charge against him and prepare a adequate defense substantially prejudice his state and federal constitutional rights to Due Process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 10 and 19 of the Texas Constitution.

For the foregoing reasons, because the indictment does not allege a culpable mental state, it fails to allege an indispensable element of the offense and is therefore substantively defective and must be quashed. If the court so finds, then the indictment may not be amended. A charging instrument may not be amended if the trial court has set it aside on a ground that the underlying statute is unconstitutional. *See State v. Eaves,* 800 S.W.2d 220, 224 (Crim. App. 1990).

The court should dismiss the prosecution of the defendant. On granting a motion to quash the charging instrument, the trial court has the authority to

dismiss prosecution. *See State v. Gray,* 801 S.W.2d 10, 11 (Tex. App. – Austin 1990); *Smith v. State,* 801 S.W.2d 629, 631 n.1 (Tex. App. – Dallas 1991); T.C.C.P. Art. 28.05. If the exception to the indictment is sustained on the ground that it fails to charge an offense, the defendant shall be discharged. *See* T.C.C.P. Art 28.07.

PRAYER

WHEREFORE, premises considered, the defendant prays that the Court set aside the information in the above-numbered and entitled cause and for such other relief that this Honorable Court deems just and right.

Respectfully submitted,
Goldstein, Goldstein, and Hilley
310 South St. Mary's Street
Suite 2900
San Antonio, Texas 78205
Tel: (210) 226-1463
Fax: (210) 226-8367

By: _____
Donald H. Flanary, III
State Bar No. 24054877
Attorney for Sam Scott

CERTIFICATE OF SERVICE

This is to certify that on June 19, 2008, a true and correct copy of the above and foregoing document was served on the Bexar County District Attorney's Office, San Antonio, Texas, by hand delivery.

_____
Donald H. Flanary, III

NO. 963428

STATE OF TEXAS	§	**IN THE COUNTY COURT**
vs.	§	**AT LAW NUMBER 7**
SAM SCOTT	§	**BEXAR COUNTY, TEXAS**

ORDER

On _____, 2008, came on to be considered Sam Scott's Motion to Quash the Information, and said motion is hereby

(Granted) (Denied)

_____
JUDGE PRESIDING

NO. 972642

STATE OF TEXAS	§	**IN THE COUNTY COURT**
vs.	§	**AT LAW NUMBER 7**
SAM SCOTT	§	**BEXAR COUNTY, TEXAS**

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Sam Scott, Defendant in the above styled and numbered cause and moves that this case be set Dismissed by virtue of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 8, 10 and 19 of the Texas Constitution, Articles 1.05, 21.01, 21.02, 21.03, 21.04, 21.05, 21. 11 and 21.19 of the Texas Code of Criminal Procedure, and Sections 1.07, 6.02 and 6.03 of the Texas Penal Code for the following reasons:

STATUE IS UNCONSTITUTIONAL

The Defendant is charged by information, with the offense of Telephone Harassment in violation of Texas Penal Code Section 42.07. This statute is facially unconstitutional void for vagueness and overbroad. *Karenev v State,* 2008 WL 902799, April 3, 2008, *Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). [First and Fourteenth Amendments to the U.S. Const., *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126 (1926), *Connally, Lanzetta v. State of New Jersey,* 306 U.S. 451 (1939) and *Sheldon v.*

State, 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed)]; and,

The Defendant is charged with Telephone Harassment and Electronic Communications Harassment. This statute has been held unconstitutionally vague because "a person of ordinary circumstances cannot tell what is prohibited and what is not." *Karenev v State,* 2008 WL 902799, April 3, 2008 *also see Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). The Court of Criminal Appeals in *Long* stated:

> "It is well-established that criminal laws must be sufficiently clear in at least three respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. Second, the law must establish determinate guidelines for law enforcement. Finally, where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness 'demands a greater degree of specificity than in other contexts.'" Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Moreover, when a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid

> even though it may not be unconstitutional as applied to the defendant's conduct." *id.*

A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Statutes and regulations must be reasonably certain to avoid vagueness that might otherwise induce individuals to forgo First Amendment rights for fear of violating an unclear law. *See Scull v. Commonwealth of Virginia,* 359 U.S. 344, 353, 79 S.Ct. 838, 3 L.Ed.2d 865 (1959). Therefore, a law must be narrowly drawn when First Amendment rights are implicated to prevent the undue constraint of such rights under the guise of regulating conduct by police power. *See Ashton v. Kentucky,* 384 U.S. 195, 200-01, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966). Otherwise, there is the risk that a vague law will cause individuals to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)).

The First Amendment protects people from vague penal statutes. *See Connally, Lanzetta v. State of New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), *Grayned v. City of Rockford,* 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), *Hynes v. Mayor & Council of Borough of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976), *Smith v.*

Goguen, 415 U.S. 566, 571, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), *Coates v. City of Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), and *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The statutes considered in each of these cases were unconstitutional because vague terms encompassed not only the impermissible conduct, but also constitutionally-protected conduct, such as free speech and free association, chilling the exercise of those freedoms and lending themselves "to harsh and discriminatory enforcement by local prosecuting officials." *Thornhill,* 310 U.S. at 97-98, 60 S.Ct. 736; *see also Coates,* 402 U.S. at 615, 91 S.Ct. 1686 (concerning free assembly); *Gooding* 405 U.S. at 519-20, 92 S.Ct. 1103 (involving criminal liability for using abusive language); *Smith,* 415 U.S. at 571-72, 94 S.Ct. 1242 (penalizing flag misuse); *Hynes,* 425 U.S. at 611, 620, 96 S.Ct. 1755 (preventing door-to-door solicitation); *Grayned,* 408 U.S. at 108, 92 S.Ct. 2294 (holding that anti-noise ordinance was not overly vague); *Lanzetta,* 306 U.S. at 458, 59 S.Ct. 618 (criminalizing being a "gangster"); *Connally,* 269 U.S. at 393, 46 S.Ct. 126 (penalizing for not paying certain wage rates).

A statute is overly-broad under the First Amendment if the terms of the challenged statute are broad enough to suppress legitimately protected First Amendment rights. *Gooding v. Wilson,* 405 U.S. 518, 522, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The overbreadth doctrine permits the facial invalidation

of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial, judged in relation to the statute's legitimate sweep. *See City of Chicago v. Morales,* 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 612-15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). To attack a statute on overbreadth grounds, one must show either that every application of the statute creates an impermissible risk of the suppression of ideas, or that the statute is "substantially" overbroad, meaning there is a realistic danger that the statute itself will significantly compromise First Amendment protections of third parties. *See New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); *City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797-99, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

The court should dismiss the prosecution of the defendant. The trial court has the authority to dismiss the prosecution. *See State v. Gray,* 801 S.W.2d 10, 11 (Tex. App. – Austin 1990); *Smith v. State,* 801 S.W.2d 629, 631 n.1 (Tex. App. – Dallas 1991); T.C.C.P. Art. 28.05.

PRAYER

WHEREFORE, premises considered, the defendant prays that the Court dismiss the above-numbered and entitled cause and for such other relief that this Honorable Court deems just and right.

Respectfully submitted,
Goldstein, Goldstein, and Hilley
310 South St. Mary's Street
Suite 2900
San Antonio, Texas 78205
Tel: (210) 226-1463
Fax: (210) 226-8367

By: _____
Donald H. Flanary, III
State Bar No. 24054877
Attorney for Sam Scott

CERTIFICATE OF SERVICE

This is to certify that on June 25, 2008, a true and correct copy of the above and foregoing document was served on the Bexar County District Attorney's Office, San Antonio, Texas, by hand delivery.

_____
Donald H. Flanary, III

NO. 972642

STATE OF TEXAS	§	**IN THE COUNTY COURT**
vs.	§	**AT LAW NUMBER 7**
SAM SCOTT	§	**BEXAR COUNTY, TEXAS**

ORDER

On _____, 2008, came on to be considered Sam Scott's Motion to Dismiss, and said motion is hereby

(Granted) (Denied)

_____
JUDGE PRESIDING

NO. 972642

STATE OF TEXAS	§	**IN THE COUNTY COURT**
vs.	§	**AT LAW NUMBER 7**
SAM SCOTT	§	**BEXAR COUNTY, TEXAS**

MOTION TO QUASH THE INFORMATION
Defective Substance

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Sam Scott, Defendant in the above styled and numbered cause and moves that the information filed in this case be set aside by virtue of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 8, 10 and 19 of the Texas Constitution, Articles 1.05, 21.01, 21.02, 21.03, 21.04, 21.05, 21. 11 and 21.19 of the Texas Code of Criminal Procedure, and Sections 1.07, 6.02 and 6.03 of the Texas Penal Code for the following reasons:

SUBSTANCE OF INFORMATION IS DEFECTIVE

The Defendant is charged by information, with the offense of Telephone Harassment in violation of Texas Penal Code Section 42.07. The substance of the indictment is defective and should be set aside for the two following fundamental reasons:

(1) the information alleges a statutory offense that is facially unconstitutional in that it is void for vagueness and overbroad. *Karenev v State,* 2008 WL 902799, April 3, 2008, *Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). [First and Fourteenth Amendments to the U.S. Const., *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126 (1926), *Connally, Lanzetta v. State of New Jersey,* 306 U.S. 451 (1939) and *Sheldon v. State,* 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed)]; and,

(2) the information fails to allege all of the elements necessary to prove an offense, [Fifth and Sixth Amendments to the U.S. Const., Art. 1 Sec 19 of the Texas Const. and, T.C.C.P. Art. 21.03].

The Code of Criminal Procedure categorizes errors in a charging instrument as either defects of substance or defects of form. *See* T.C.C.P Arts. 27.08 and 27.09. A defect of substance goes to the essence of the allegation of the offense. The defects of substance that may be raised in a motion to quash are: (1) that the information fails to charge an offense [T.C.C.P Art 27.08] and (2) that the statutory offense alleged is facially unconstitutional. *See Sheldon v. State,* 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed) (claim that a statute is void for vaguenss on its face may be presented in a motion to quash.)

Statute Alleged is Facially Unconstitutional
Statue Vague and Overbroad

The offenses of Telephone Harassment and Electronic Communications Harassment as defined in Texas Penal Code Section 42.07(a) is unconstitutional on its face in that it is vague and overbroad, and violates the First Amendment of the United States Constitution.

It is well settled that an indictment may be quashed if the statute creating the offense charged is unconstitutional. Therefore, a motion to quash is one means of testing the validity of a statute which is potentially unconstitutional. *White v. State,* 440 S.W. 2d 660, 667 (Crim. App. 1969). Furthermore, a charging instrument may not be amended if the trial court has set it aside on the grounds that the underlying statute is unconstitutional. *State v. Evans,* 800 S.W.2d 220, 225 (Crim. App. 1990).

The Defendant is charged with Telephone Harassment and Electronic Communications Harassment. This statute has been held unconstitutionally vague because "a person of ordinary circumstances cannot tell what is prohibited and what is not." *Karenev v State,* 2008 WL 902799, April 3, 2008 *also see Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). The information should likewise be quashed because the manner and means are unconstitutionally vague. The Court of Criminal Appeals in *Long* stated:

> "It is well-established that criminal laws must be sufficiently clear in at least three

> respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. Second, the law must establish determinate guidelines for law enforcement. Finally, where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness 'demands a greater degree of specificity than in other contexts.'" Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Moreover, when a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct." *id.*

A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Statutes and regulations must be reasonably certain to avoid vagueness that might otherwise induce individuals to forgo First Amendment rights for fear of violating an unclear law. *See Scull v. Commonwealth of Virginia*, 359 U.S. 344, 353, 79 S.Ct. 838, 3 L.Ed.2d 865 (1959). Therefore, a law must be narrowly drawn when First

Amendment rights are implicated to prevent the undue constraint of such rights under the guise of regulating conduct by police power. *See Ashton v. Kentucky,* 384 U.S. 195, 200-01, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966). Otherwise, there is the risk that a vague law will cause individuals to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)).

The First Amendment protects people from vague penal statutes. *See Connally, Lanzetta v. State of New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), *Grayned v. City of Rockford,* 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), *Hynes v. Mayor & Council of Borough of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976), *Smith v. Goguen,* 415 U.S. 566, 571, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), *Coates v. City of Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), and *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The statutes considered in each of these cases were unconstitutional because vague terms encompassed not only the impermissible conduct, but also constitutionally-protected conduct, such as free speech and free association, chilling the exercise of those freedoms and lending themselves "to harsh and discriminatory enforcement by local prosecuting officials." *Thornhill,* 310 U.S. at 97-98, 60 S.Ct.

736; *see also Coates*, 402 U.S. at 615, 91 S.Ct. 1686 (concerning free assembly); *Gooding* 405 U.S. at 519-20, 92 S.Ct. 1103 (involving criminal liability for using abusive language); *Smith,* 415 U.S. at 571-72, 94 S.Ct. 1242 (penalizing flag misuse); *Hynes,* 425 U.S. at 611, 620, 96 S.Ct. 1755 (preventing door-to-door solicitation); *Grayned,* 408 U.S. at 108, 92 S.Ct. 2294 (holding that anti-noise ordinance was not overly vague); *Lanzetta,* 306 U.S. at 458, 59 S.Ct. 618 (criminalizing being a "gangster"); *Connally,* 269 U.S. at 393, 46 S.Ct. 126 (penalizing for not paying certain wage rates).

A statute is overly-broad under the First Amendment if the terms of the challenged statute are broad enough to suppress legitimately protected First Amendment rights. *Gooding v. Wilson,* 405 U.S. 518, 522, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial, judged in relation to the statute's legitimate sweep. *See City of Chicago v. Morales,* 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 612-15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). To attack a statute on overbreadth grounds, one must show either that every application of the statute creates an impermissible risk of the suppression of ideas, or that the statute is "substantially" overbroad, meaning there is a realistic danger that the statute itself will significantly compromise First Amendment

protections of third parties. *See New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); *City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797-99, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

The information in this case should be set aside for being unconstitutionally vague and overbroad. If the court so finds, then the information should not be amended. A charging instrument may not be amended if the trial court has set it aside on a ground that the underlying statute is unconstitutional. *See State v. Eaves,* 800 S.W.2d 220, 224 (Crim. App. 1990).

The court should dismiss the prosecution of the defendant. On granting a motion to quash the charging instrument, the trial court has the authority to dismiss the prosecution. *See State v. Gray,* 801 S.W.2d 10, 11 (Tex. App. – Austin 1990); *Smith v. State,* 801 S.W.2d 629, 631 n.1 (Tex. App. – Dallas 1991); T.C.C.P. Art. 28.05. If the exception to the indictment is sustained on the ground it fails to charge an offense, the defendant should be discharged. *See* T.C.C.P. Art 28.07.

Failure to Allege Elements of an Offense

In order to state an offense, an indictment must allege each and every element of the offense. T.C.C.P. Art. 21.03; *Ex parte Winton,* 549 S.W.2d 751, 752 (Crim. App. 1977). There is no exception to the substance of an indictment if it does not appear there

from that an offense against the law was committed by the defendant. T.C.C.P Art. 27.08. The Texas Penal Code defines "element of offense" as: "(A) the forbidden conduct; (B) the required culpability; (C) any required result; and (D) the negation of any exception to the offense" Tex. Pen. Code Sec. 1.07(a)(22); *Holly v. State,* 167 S.W.3d 546, 548 (Tex. App. – Houston [14th Dist.] 2005, no pet.) The indictment against the Defendant fails to allege two fundamental and independent elements of the offense prohibited in Transportation Code Section 545.420 of which the Defendant is charged.

The information against the defendant fails to allege an offense against the laws of the state of Texas because it fails to allege indispensable elements of an offense. The information fails to allege an offense in two regards, (1) it fails to allege that the defendant committed an offense with the requisite mental state and (2) it fails to allege all elements of the offense. The information's failure to allege elements of the offense violate the Defendant's state and federal constitutional rights to Due Process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 10 and 19 of the Texas Constitution.

No Culpable Mental State Alleged

The information fails to allege a culpable mental state. Criminal offenses require a culpable mental state. Where the particular mental state required is

not set forth in the Code section defining the offense and the statutory definition does not plainly dispense with the mental element, the applicable culpable mental state is found by reference to a general statute. *See* Tex. Pen. Code Sec. 6.02 and 6.03. The Texas Penal Code's Section 6.02 *Requirement of Culpability* states that "a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires." Accordingly, "if the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." Texas Code of Criminal Procedure Article 21.05 mandates that "[w]here a particular intent is a material fact in the description of the offense, it must be stated in the indictment." Thus, where a culpable mental state is required, the state's failure to plead it is a defect in the indictment. *See* T.C.C.P. Art. 21.05; *Ex parte Winton,* 549 S.W.2d 751, 752 (Crim. App. 1977); *Baldwin v. State*, 538 S. W.2d 109, 112 (Tex. Crim. App. 1976); *Ex parte Rodgers,* 589 S.W.2d 751 752 (Crim. App. 1979) (failure to allege requirement of culpable mental state for offense of failing to stop and render aid made the indictment fundamentally defective.)

The information alleges that the Defendant committed the offense in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant. This language has been held to be unconstitutionally vague. *See Karenev v*

State, 2008 WL 902799, April 3, 2008, and *Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996).

Again, the Court of Criminal Appeals in *Long* stated that must be sufficiently clear that a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited, that the law must establish determinate guidelines for law enforcement, and that where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression.

The failure of the information to allege an essential element of the offense, namely the required culpable mental state, prevents the Defendant from understanding the nature of the charges against him and denies him the ability to prepare an adequate defense. The Defendant's inability understand the nature of the charge against him and prepare a adequate defense substantially prejudice his state and federal constitutional rights to Due Process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 10 and 19 of the Texas Constitution.

For the foregoing reasons, because the indictment does not allege a culpable mental state, it fails to allege an indispensable element of the offense and is therefore substantively defective and must be quashed. If the court so finds, then the indictment may not be amended. A charging instrument may not be amended if the trial court has set it aside on a ground that the underlying statute is unconstitutional. *See State v. Eaves,* 800 S.W.2d 220, 224 (Crim. App. 1990).

The court should dismiss the prosecution of the defendant. On granting a motion to quash the charging instrument, the trial court has the authority to dismiss prosecution. *See State v. Gray,* 801 S.W.2d 10, 11 (Tex. App. – Austin 1990); *Smith v. State,* 801 S.W.2d 629, 631 n.1 (Tex. App. – Dallas 1991); T.C.C.P. Art. 28.05. If the exception to the indictment is sustained on the ground that it fails to charge an offense, the defendant shall be discharged. *See* T.C.C.P. Art 28.07.

PRAYER

WHEREFORE, premises considered, the defendant prays that the Court set aside the information in the above-numbered and entitled cause and for such other relief that this Honorable Court deems just and right.

Respectfully submitted,
Goldstein, Goldstein, and Hilley
310 South St. Mary's Street
Suite 2900
San Antonio, Texas 78205
Tel: (210) 226-1463
Fax: (210) 226-8367

By: _____
Donald H. Flanary, III
State Bar No. 24054877
Attorney for Sam Scott

CERTIFICATE OF SERVICE

This is to certify that on June 19, 2008, a true and correct copy of the above and foregoing document was served on the Bexar County District Attorney's Office, San Antonio, Texas, by hand delivery.

Donald H. Flanary, III

NO. 972642

STATE OF TEXAS	§	**IN THE COUNTY COURT**
vs.	§	**AT LAW NUMBER 7**
SAM SCOTT	§	**BEXAR COUNTY, TEXAS**

ORDER

On _____, 2008, came on to be considered Sam Scott's Motion to Quash the Information, and said motion is hereby

(Granted) (Denied)

JUDGE PRESIDING

Information
Samuel Scott

County Court Case Number: 963428

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

Now comes the undersigned Assistant Criminal District Attorney of Bexar County, Texas, upon the affidavit of affiant, hereto attached and made a part thereof, and in behalf of said State presents in the County Court at Law No.___ of Bexar County, Texas, that heretrofore, to-wit: in said County of Bexar and State of Texas, and before the making and filing of this information,

> on or about the 5th Day of December, 2005, SAMUEL SCOTT, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did MAKE REPEATED COMMUNICATIONS TO THE COMPLAINANT, to wit: telephone calls, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS AND OFFEND THE COMPPLAINANT;

against the peace and dignity of the State.

Information
Samuel Scott

County Court Case Number: 972642

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Now comes the undersigned Assistant Criminal District Attorney of Bexar County, Texas, upon the affidavit of affiant, hereto attached and made a part thereof, and in behalf of said State presents in the County Court at Law No.___ of Bexar County, Texas, that heretrofore, to-wit: in said County of Bexar and State of Texas, and before the making and filing of this information,

> On or about the 12th Day of March, 2006, SAMUEL SCOTT, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did MAKE REPEATED TELEPHONE COMMUNICATIONS TO THE COMPLAINANT IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS AND OFFEND THE COMPLAINANT; to wit: the defendant called the complainant repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail messages;

Against the peace and dignity of the State.

NO's. PD-1069-09 & PD-1070-09

TO THE COURT OF CRIMINAL APPEALS OF TEXAS AT AUSTIN, TEXAS

SAMUEL SCOTT
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

FROM THE FOURTH COURT OF APPEALS AT SAN ANTONIO, TEXAS
CAUSE NO'S. 04-08-00501-CR & 04-08-00502-CR

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

ORAL ARGUMENT PERMITTED AND REQUESTED

DONALD H. FLANARY, III.
Bar No. 24045877
GOLDSTEIN, GOLDSTEIN & HILLEY
310 S. St. Mary's St.
29th Floor Tower Life Building
San Antonio, Texas 78205
210-226-1463
210-226-8367 facsimile
By: /s/ Donald H. Flanary, III
DONALD H. FLANARY, III
Attorney for Appellant,
SAMUEL SCOTT

IDENTITY OF THE PARTIES AND COUNSEL

A complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel is provided here. See. Tex. R. App. P. 38.1(a).

Counsel for the State:

Kevin Patrick Yeary – Counsel on appeal and on discretionary review
Helen Petry – Counsel on appeal
Carlos Solis – Counsel at trial.
Assistant Criminal District Attorneys
Bexar County, Texas
Cadena-Reeves Justice Center
300 Dolorosa, Suite 4030
San Antonio, Texas 78205

Appellant or Criminal Defendant:

Samuel Scott

Counsel for Appellant:

Golstein, Goldstein, and Hilley
Donald H. Flanary, III. – Counsel at trial and on appeal
310 South St. Mary's Street, Suite 2900
San Antonio, Texas 78205

Trial Judge:

Hon. Monica E. Guerrero – Presiding Judge

Fourth Court of Appeals:

Hon. Karen Angelini – Justice
Hon. Sandee Bryan Marion – Justice
Hon. Phylis J. Speedlin – Justice

TABLE OF CONTENTS

	PAGE(S)
IDENTITY OF THE PARTIES AND COUNSEL	ii
TABLE OF CONTENTS	iii
INDEX OF AUTHORITIES	iv
STATEMENT REGARDING ORAL ARGUMENT	ix
STATEMENT OF THE CASE	ix
STATEMENT OF THE ISSUES	1
ARGUMENT	2
PRAYER FOR RELIEF	26
CERTIFICATE OF SERVICE	27

INDEX OF AUTHORITIES

Cases **PAGE(S)**

American Communications Ass'n, C.I.O., v. Douds, 399 U.S. 382 (1950) 21

Ashton v. Kentucky, 384 U.S. 195, 198 (1966) 11, 28

Baldwin v. State, 538 S.W.2d 109, 112 (Tex. Crim. App. 1976) 26

Baggett v. Bullitt, 377 U.S. 360, 372 (1964) 11

Benefit v. Cambridge, 424 Mass. 918, 925, 679 N.E.2d 184 (1997) 20

Boykin v. State, 818 S.W.2d 782, 785-786 (Tex.Crim.App. 1991) 2

Brandenburg v. Ohio, 395 U.S. 444 (1969).....21

Bridges v. State of California, 314 U.S. 252, 265-266 (1941).....3

Broadrick v. Oklahoma, 413 U.S. 601 (1973).....17

Carey v. Brown, 447 U.S. 455, 471 (1980) 20, 22

City of Chicago v. Morales, 527 U.S. 41, 52, (1999).....17

City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797-99 (1984)..... 17

Coates v. City of Cincinnati, 402 U.S. 611 (1971).....12

Connally v. General Constr. Co., 269 U.S. 385, 391, (1926).....xi, 9, 11, 12, 23,

Dowthitt v. State, 931 S.W.2d 244, 258 (Tex.Crim.App.1996).....2

Ex Parte Patterson, 969 S.W.2d 16, 19 (Tex.Crim.App. 1998).....7

Ex parte Rodgers, 589 S.W.2d 751 752 (Tex.Crim.App. – 1979).....26

Ex parte Winton, 549 S.W.2d 751, 752 (Tex.Crim.App. – 1977).....23, 24, 25, 26,

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).....5

Gooding v. Wilson, 405 U.S. 518, (1972).....12, 17

Grayned v. City of Rockford, 408 U.S. 104, 109,(1972) 12

Griswold v. Connecticut, 381 U.S. 479, 483-485 (1965) 4

Hill v. Colorado, 530 U.S. 703, 714-718 (2000) 3

Holly v. State, 167 S.W.3d 546, 548 (Tex. App. – Houston [14th Dist.] 2005, no pet.) 23, 25

Hynes v. Mayor & Council of Borough of Oradell, 425 U.S. 610, (1976) 12

Hess v. Indiana, 414 U.S. 105 (1973) 21

Karenev v.State, 281 S.W.3d 428 (Tex.Crim.App. 2009) 6,

Karenev v. State, 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008), *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009); ..... xi, 6, 8, 9, 12, 15, 16, 23, 22, 24, 27,

Kinglsey Intern. Pictures Corp. v. Regents of University of State of N.Y., 360 U.S. 684 (1959) 21,

Kramer v. Price, 712 F.2d 174 (5th Cir. 1983) 6, 11, 12, 14,

Lanzetta v. State of New Jersey, 306 U.S. 451(1939) ..... x, 9, 12, 21, 23,

Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996) ..... xi, 6, 9, 10, 11, 12, 15, 23, 24, 27, 29

Martinez v. State, 22 S.W.3d 504, 507 (Tex.Crim.App. 2000) 29

May v. State 765 S.W. 2d 438 (Tex.Crim.App. – 1989) 6, 14,

Mills v. Alabama, 384 U.S. 214, 218 (1966) 5,

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460462 (1958) 4,

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11 (1988) 17,

Nix v. State. See, Nix v. State, 65 S.W.2d 664 (Tex.Crim.App. 2001) 8,

Olvera v. State, 806 S.W.2d 546, 552 (Tex.Crim.App. 1991) 28,

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) 20, 21

R.A.V. v. St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) 21,

Rhode Island v Innis, 446 U.S. 291, 302 (1980) 10

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) 5,

Sanchez v. State, 995 S.W.2d 677 (Tex.Crim.App. 1999) 2

Schenck v. United States, 249 U.S. 47, 52 (1919) 21,

Scott v. State, 298 S.W.3d 264, 270-274 (Tex.App. – San Antonio 2009) ix

Scull v. Commonwealth of Virginia, 359 U.S. 344, 353, (1959) 11,

Sheldon v. State, 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed) 9, 21, 24

Smith v. Goguen, 415 U.S. 566, (1974) 12,

Smith v. State, 801 S.W.2d 629, 631 (Tex. App. – Dallas 1991) 28

Speiser v. Randall, 357 U.S. 513, 526, (1958) 11,

Stanley v. Georgia, 394 U.S. 557, 564 (1969) 4,

State v. Evans, 800 S.W.2d 220, 224 (Tex.Crim.App. – 1990).....22, 24, 25, 28

State v. Gray, 801 S.W.2d 10, 11 (Tex. App. – Austin 1990).....28

Thomas v. Collins, 323 U.S. 516 (1945).....20

Thorne v. Bailey, 846 F.2d 241 (4th Cir. 1988) 3,

Thornhill v. Alabama, 310 U.S. 88, (1940).....12,

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).....20,

U.S. v. Popa, 187 F.3d 672, 678 (D.C. Cir. Court of Appeals, 1999).....4,

Village of Hoffman Estates, 455 U.S. 489 (1982).....6

Watts v. U.S., 394 U.S. 705, 707 (1969) 20, 21, 22

White v. State, 440 S.W. 2d 660, 667 (Tex.Crim.App. – 1969).....24

Statutes

First Amendment, U.S. Constitution.....*passim*

Fifth Amendment, U.S. Constitution.....*passim*

Sixth Amendment, U.S. Constitution

Fourteenth Amendment, U.S. Constitution .....*passim*

Texas Constitution Article 1 § 8 .....*passim*

Texas Constitution Article 1 § 10 .....*passim*

Texas Constitution Article 1 § 19 8

47 U.S.C. § 223 (1982) 4

Tex. Pen. Code Ann. § 42.07 (Vernon 2003) 3, 11, 12, 15, 16, 20, 21,

Tex. Penal Code § 42.07(b)(1) (Vernon 2003) 17

Tex. Pen. Code Ann. § 1.07 (Vernon 2003) 8, 23

Tex. Pen. Code Ann. § 6.02 (Vernon 2003) 8, 26

Tex. Pen. Code Ann. § 6.03 (Vernon 2003) 8,26

Tex. Crim. Proc. Code Ann. § 44.02 (Vernon 2003) 7,

Tex. Crim. Proc. Code Ann. § 1.05 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 21.01 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 21.02 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 21.03 (Vernon 2003) 8, 21

Tex. Crim. Proc. Code Ann. § 21.04 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 21.05 (Vernon 2003) 8, 26

Tex. Crim. Proc. Code Ann. § 21.11 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 21.19 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 21.20 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 21.21 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 21.23 (Vernon 2003) 8,

Tex. Crim. Proc. Code Ann. § 27.08 (Vernon 2003) 24

Tex. Crim. Proc. Code Ann. § 27.09 (Vernon 2003) 24

Tex. Crim. Proc. Code Ann. § 28.05 (Vernon 2003) 28

Tex. Crim. Proc. Code Ann. § 28.07 (Vernon 2003) 28

House Comm. On Criminal Jurisprudence, Committee Report, Tex. S.B. 139, 77th Leg., R.S. (2001) 5, 22

STATEMENT REGARDING ORAL ARGUMENT

In its order granting discretionary review in this case, this Honorable Court noted that Oral Argument would be permitted. Believing the issues presented in this case to be important to the jurisprudence of this State and that oral argument will permit further and more complete elucidation of the issues, Appellant, Sam Scott requests oral argument in this case.

STATEMENT OF THE CASE

This is a harassment case[1], involving telephone calls and voice-mail messages. Appellant files this Brief in support of both Court of Appeals Numbers 04-08-00501-CR and 04-08-00502-CR. The issues presented in both Court of Appeals Numbers are the same. Appellant, Sam Scott, ("Scott") timely filed a written Motion to Quash the Information and Motion to Dismiss, both of which were denied after a hearing on June 25, 2008 [M-RR14[2]]. Scott entered a conditional plea [M-RR15] to the two charges (Cause Numbers 972642 and 963428) after his Motion to Quash the Information and Motion to Dismiss were denied and he was found guilty on June 25, 2008. Scott preserved his right to appeal the denial of these two motions [M-RR 14-15, P-RR8] and he was sentenced to two days in the Bexar County Jail and a $50, fifty dollar, fine in each case, with the sentence and fine to run concurrently [P-RR8[3]]. He timely filed a Notice of Appeal on July 7, 2008. The Fourth Court of Appeals held that TPC § 42.07 implicates the First Amendment, does not contain a reasonable person

---

[1] Texas Penal Code Section 42.07, Harassment

[2] "M-RR" refers to the Reporter's Record of the "Motion to Quash the Information, Motion to Dismiss" filed on September 4, 2008, which is followed by the corresponding page number in the record Only one volume was filed

[3] "P-RR" refers to the Reporter's Record of the "Plea Before the Court" filed on September 4, 2008, which is followed by the corresponding page number in the record Only one volume was filed

standard, and subsections (a)(4) and (7) are unconstitutional on their face. *Scott v. State*, 298 S.W.3d 264, 270-274 (Tex.App. – San Antonio 2009). The Fourth Court reasoned that the terms contained within the statute, "repeatedly", "annoy", "alarm", and "embarrass" are unconstitutionally vague. *Id.* at 274. The State filed Petition for Discretionary Review, which was granted on January 22, 2010.

STATEMENT OF FACTS

On June 25, 2008, Appellant Scott was convicted on two charges of Harassment in violation of TPC § 42.07 [P-RR8]. In cause number 972642, Scott was accused, by his estranged wife Yvette Scott, of making repeated telephone calls to her late at night and leaving abusive and harassing voice-mail messages for her on March 12, 2008 [P-RR3]. In cause number 963428, Scott was accused of making repeated phone calls to Yvett Scott on December 5, 2006 that offended her. [P-RR3].

SUMMARY OF ARGUMENT

Appellant Scott argues, as he did at trial and on appeal, that TPC § 42.07 implicates the First Amendment. Scott contends that TPC § 42.07, which makes it an offense for a person to cause a telephone to ring repeatedly, or makes telephone communications, or repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another is unconstitutional as applied to the Appellant and is

facially unconstitutionally void for vagueness in violation of the 1st Amendment to the United States Constitution and Article 1 § 8 of the Texas Constitution. *Karenev v State*, 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008), *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009); *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996). [First and Fourteenth Amendments to the U.S. Const., *Connally v. General Constr. Co.*, 269 U.S. 385, 391(1926); *Lanzetta v. State of New Jersey*, 306 U.S. 451(1939) and *Sheldon v. State*, 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed)]. Scott further contends that the substance of the information of which he was charged was defective and should have been set aside for the two following fundamental reasons: first, the information alleged a statutory offense that is facially unconstitutional in that it is void for vagueness and overbroad as noted above, and second, the information failed to allege all of the elements necessary to prove an offense [Fifth and Sixth Amendments to the U.S. Const., Art. 1 Sec 19 of the Texas Const. and, T.C.C.P. Art. 21.03].

THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS

STATEMENT OF THE ISSUES

I. Texas Penal Section 42.07, Harassment, of which the Appelleee was Convicted Implicates the Freedom of Expression Protections of the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 8 of the Texas Constitution.

II. In Contrast to *Karenev v. State*, Samuel Scott Preserved Error to Make a Facial and As-Applied Challenge to the Constitutionality of Texas Penal Code § 42.07

III. Texas Penal Section 42.07, Harassment, of which the Appellant was Convicted, is Unconstitutionally Vague and Overbroad. 1st, 5th, 6th, & 14th Amend. US Const., Article I §§ 8, 10 & 19 Texas Const., Artıcles 1.05 Texas Code of Criminal Procedure, (TCCP), & Texas Penal Code (TPC) §§ 1.07, 6.02 & 6.03. M-RR 3-15.

IV. The Information is Defective in Its Substance for Alleging an Offense that is Facially Unconstitutional in that It is Void for Vagueness and Overbroad. 1st, 5th, 6th, & 14th Amend. US Const., Article I §§ 8, 10 & 19 Texas Const., Articles 1.05, 21.01, 21.02, 21.03, 21.04, 21.05, 21. 11, 21.19, 21.20, 21.21, & 21.23 Texas Code of Criminal Procedure, (TCCP), & Texas Penal Code (TPC) §§ 1.07, 6.02 & 6.03. M-RR 3-15.

V. The Information is Defective in Its Substance for Failing to Allege All of the Elements Necessary to Prove an Offense. 1st, 5th, 6th, & 14th Amend. US Const., Article I §§ 8, 10 & 19 Texas Const., Articles 1.05, 21.01, 21.02, 21.03, 21.04, 21.05, 21. 11, 21.19, 21.20, 21.21, & 21.23 Texas Code of Criminal Procedure, (TCCP), & Texas Penal Code (TPC) §§ 1.07, 6.02 & 6.03. M-RR 3-15.

ARGUMENT

I. Texas Penal Section 42.07, Harassment, of which the Appelleee was Convicted Implicates the Freedom of Expression Protections of the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 8 of the Texas Constitution.

The qualified prohibitions laid down by the framers of the First Amendment were intended to give liberty of expression, compared to other important liberties, the broadest scope that could be countenanced in our constitutional democracy. *Bridges v. State of California*, 314 U.S. 252, 265-266 (1941). Therefore, determining whether a statute impinges on the fundamental principles within the First Amendment is crucial. The plain meaning and legislative intent of Texas Penal Code § 42.07 implicates the First Amendment's freedom of expression.

This Court "interpret[s] a statute in accordance with the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results". *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex.Crim.App. 1999); *Boykin v. State*, 818 S.W.2d 782, 785-786 (Tex.Crim.App. 1991). In determining plain meaning, "words and phrases shall be read in context and construed according to the rules of grammar and usage". TEX. GOV'T CODE § 311.011(a); *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex.Crim.App. 1999); *Dowthitt v. State*, 931 S.W.2d 244, 258 (Tex.Crim.App.1996).

Texas Penal Code § 42.07 implicates the First Amendment. The statue states:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
>
> (1) initiates **communication** by telephone, in writing, or by electronic **communication** and in the course of the **communication** makes a comment, request, suggestion, or proposal that is obscene;
>
> (2) threatens, by telephone, in writing, or by electronic **communication**, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of his family or household, or his property;
>
> (3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone **communications** anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;
>
> (5) makes a telephone call and intentionally fails to hang up or disengage the connection;

> (6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section; or
>
> (7) sends repeated electronic **communications** in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

The statute uses the word 'communication' six times. The plain meaning of 'communication', whether through words or conduct, is expression protected by the First Amendment. Where a person is punished pursuant to a law that restricts 'communication', the law is a content-based restriction on the First Amendment freedom of expression, subject to strict scrutiny. See, *Hill v. Colorado*, 530 U.S. 703, 714-718 (2000).

In their brief, the State relies on *Thorne v. Bailey* for the proposition that harassment does not implicate the First Amendment. See, State's Brief 13, citing *Thorne v. Bailey*, 846 F.2d 241 (4th Cir. 1988)). However, as the Fourth Circuit Court of Appeals in *Thorne* pointed out, the West Virginia statute did not once use the word 'communication'. The statute at issue in that case did "not preclude mere communication" in any form. *Thorne*, 846 F.2d at 244. The statute in *Thorne* effected conduct, while Texas Penal Code § 42.07 prohibits certain communication and conduct, which are within the province of First Amendment protection. Additionally, the Fourth Circuit Court of Appeals in *Thorne* sought guidance from the federal telephone harassment statute, 47

U.S.C. § 223 (1982). However, that statute used the language "solely to harass", a limitation that is not included in Texas Penal Code § 42.07.

The federal telephone statute constructed in *Thorne*, 47 U.S.C. § 223(a)(1)(C), reads as follows, "makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications". 42 U.S.C. § 223(a)(1)(C) (1982). That provision was ruled vague because a person convicted under it "engaged in protected speech that § 223(a)(1)(C) purports to punish". *U.S. v. Popa*, 187 F.3d 672, 678 (D.C. Cir. Court of Appeals 1999). The D.C. Circuit in *Popa* held that a statute that was more narrow than Texas Penal Code § 42.07 "could have been drawn more narrowly, without any loss of utility to the Government . . . " *Id.* at 677. The D.C. Circuit additionally noted that the terms "annoy" and "harass" were constitutionally overbroad because a person may call a public official and intentionally "annoy him into changing a course of public action, or "harass" him until he addresses problems previously left unaddressed." Id. The combination of speech and conduct, according the D.C. Circuit, is protected by the First Amendment.

Central to the First Amendment is a broad right to access. See, e.g., *Stanley v. Georgia,* 394 U.S. 557, 564 (1969) (right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 483-485 (1965) (right to privacy);

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460462 (1958) (right of association). The free flow of communication cannot be restricted without a compelling state interest. *Connick v. Myers*, 461 U.S. 138, 161 (1983); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980); *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The legislative intent reveals that Texas Penal Code § 42.07 violates these fundamental First Amendment rights.

In 2001, the statute was amended to prohibit certain electronic communications. The legislative intent reveals concerns with the First Amendment implications of the statute. The House Committee Report states that some legislators were disturbed with the broad scope of the law, asserting that the statute should be limited to "cover electronic communication that threatens bodily injury or to commit a felony against a person or a member of the person's family or household". House Comm. On Criminal Jurisprudence, Committee Report, Tex. S.B. 139, 77th Leg., R.S. (2001). Importantly, a threat of bodily injury or a threat of a felony are both more objective standards, are almost exclusively conduct-based, and are likely within the 'true threat' limitation outlined by the Supreme Court. See, *Watts, v. United States*, 394 U.S. 705 (1969). The substitution of those standards may limit the statute's First Amendment exposure.

Instead, the current statute includes the broad and vague language that was criticized during the

passage of the 2001 amendment, and in case law because it includes speech and conduct that may be "annoying but should not be a criminal offense". House Comm. On Criminal Jurisprudence, Committee Report, Tex. S.B. 139, 77th Leg., R.S. (2001).

Most importantly, the 2001 amendment to the statute repeated the infirmities of the of the old Texas Penal Code § 42.07 that were corrected by *Kramer v. Price* and *Long v. State*. In *Kramer v. Price,* the Fifth Circuit held that the words "annoy" and "harm" implicated the First Amendment in the prior Texas Harassment statute. See, *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983). However, after the 2001 amendment, the current version of Texas Penal Code § 42.07 suffers from the same problem remedied by Kramer and May. See, *May*, 765 S.W.2d at 440. The inclusion of "alarm", "annoy", "harm" in both TPC § 42.07(4) and (7) implicates the First Amendment. And when "the statute's language is capable of reaching protected speech or otherwise threatens to inhibit the exercise of constitutional rights" a First Amendment analysis is necessary. *Village of Hoffman Estates*, 455 U.S. 489, 498-499 (1982).

This Court, in *Long v. State*, noted that "First Amendment considerations" are often "intertwined with the vagueness issue". *Long v. State*, 931 S.W.2d 285, 288 (Tex.Crim.App. 1996). Vagueness, overbreadth, and the First Amendment analysis are discussed infra.

II. In Contrast to *Karenev v. State*, Samuel Scott Preserved Error to Make a Facial and As-Applied Challenge to the Constitutionality of Texas Penal Code § 42.07

In a similar factual setting, this Court in *Karenev v. State* held that appellant Karenev failed to preserve a constitutional challenge to Texas Penal Code § 42.07. *Karenev v State,* 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009). Appellant Karenev was convicted after a jury trial. *Karenev v. State*, 258 S.W.3d 210, 211 (Tex. App. – Fort Worth 2008). This Honorable Court relied on *Marın v. State* in denying appellant Karenev's challenge to Texas Penal Code § 42.07. Marin held "that [Texas Rules of Appellate Procedure] Rule 52(a) applies only to actions of the trial judge concerning which a party forfeits the benefit of a right belonging to him ıf he does not complaint about it at trial". *Karenev*, 851 S.W.2d at 280.

In contrast, in the ınstant case, Appellant Scott entered a conditional plea of nolo contendere without a jury trial. Appellant Scott preserved error through both a Motion to Dismiss and a Motion to Quash the Information at the trial court. Scott acted in accordance with Tex. Code Crim. Proc. Ann. Art. 44.02 and preserved his right to appeal. Tex. Crim. Proc. Code Ann. § 44.02 (Vernon 2003). On the record, Appellant Scott's counsel argued that the Texas Penal Code § 42.07 is "facially unconstitutional for vagueness, and we also contend that it's overbroad". (M-RR, 4).

Scott's counsel also presented case law and related rationale in arguing that the County Court should grant the Motion to Quash the Information and Motion to Dismiss because the statute was facially unconstitutional. (M-RR, 4-14). In denying Scott's motions, the Honoroable Judge Guerrero stated, "All your motions have been preserved for purposes of appeal and maybe the Fourth Court of Appeals can give me some further instruction as to how I should proceed on this particular statute . . . ". (M-RR, 7).

Additionally, the record of the Plea Hearing states, "you are preserving your right to appeal any written motion filed and ruled on before the Court, including the Motion to Quash the Information and the Motion to Dismiss". (P-RR, 8).

Appellant Scott's Motion to Quash the Information and Motion to Dismiss comply with the "very nearly" exclusive list of void judgments discussed in *Nix v. State*. *See, Nix v. State,* 65 S.W.2d 664, 668 (Tex.Crim.App. 2001). These exceptions to judgment are premised on the notion that a "void judgment is a nullity and can be attacked at any time". *Ex Parte Patterson*, 969 S.W.2d 16, 19 (Tex.Crim.App. 1998). Specifically, Appellant Scott complies with the exception, "the document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument" *Nix v. State*, 65 S.W.2d 664, 668 (Tex.Crim.App. 2001). Scott complied with that

provision by filing and presenting his Motion to Quash the Information and Motion to Dismiss.

On appeal, Appellant Karenev failed to argue that Texas Penal Code § 42.07 violates the First Amendment and Article I § 8 of the Texas Constitution. Rather, Appellant Karenev merely cited *Kramer v. Price* for the authority that Texas Penal Code § 42.07 is overbroad. The lower court in Karenev elected to "construe Appellant's vagueness argument" as a First Amendment challenge. *Karenev v. State*, 258 S.W.3d 210, 213 (Tex.App. – Fort Worth 2008). However, in this case, Appellant Scott preserved his constitutional claims at the Court of Appeals by arguing making both as applied and facial constitutional challenges based on Texas Penal Code § 42.07 being vague and overbroad.

III. Texas Penal Section 42.07, Harassment, of which the Appellant was Convicted, is Unconstitutionally Vague and Overbroad. 1st, 5th, 6th, & 14th Amend. US Const., Article I §§ 8, 10 & 19 Texas Const., Articles 1.05 Texas Code of Criminal Procedure, (TCCP), & Texas Penal Code (TPC) §§ 1.07, 6.02 & 6.03. M-RR 3-15.

IV. The Information is Defective in Its Substance for Alleging an Offense that is Facially Unconstitutional in that It is Void for Vagueness and Overbroad. 1st, 5th, 6th, & 14th Amend. US Const., Article I §§ 8, 10 & 19 Texas Const., Articles 1.05, 21.01, 21.02,

21.03, 21.04, 21.05, 21. 11, 21.19, 21.20, 21.21, & 21.23 Texas Code of Criminal Procedure, (TCCP), & Texas Penal Code (TPC) §§ 1.07, 6.02 & 6.03. M-RR 3-15.

V. **The Information is Defective in Its Substance for Failing to Allege All of the Elements Necessary to Prove an Offense. 1st, 5th, 6th, & 14th Amend. US Const., Article I §§ 8, 10 & 19 Texas Const., Articles 1.05, 21.01, 21.02, 21.03, 21.04, 21.05, 21. 11, 21.19, 21.20, 21.21, & 21.23 Texas Code of Criminal Procedure, (TCCP), & Texas Penal Code (TPC) §§ 1.07, 6.02 & 6.03. M-RR 3-15.**

Issues III, IV, and V will be argued together.

HARASSMENT STATUE IS UNCONSTITUTIONAL

Void for Vagueness and Overbroad

Appellant Scott was charged with the offense of Harassment in violation of TPC § 42.07. This statute is unconstitutionally void for vagueness and overbroad on its face as well as unconstitutional as applied in violation of the 1st Amendment to the United States Constitution and Article 1 § 8 of the Texas Constitution. *Karenev v State,* 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009); *Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). [First and Fourteenth Amendments to the U.S. Const., *Connally v. General Constr. Co.,* 269 U.S. 385 (1926), *Lanzetta v. State of New Jersey,* 306 U.S. 451(1939) and *Sheldon v. State,* 100 S.W.3d 497, 501 (Tex. App.

– Austin 2003, pet filed)]; Article I §§ 8, 10 & 19 Texas Const; and,

The Harassment statute is unconstitutionally vague because "a person of ordinary circumstances cannot tell what is prohibited and what is not." *Karenev v State,* 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009); *also see Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). The Court of Criminal Appeals in *Long* [in holding that the terms "annoy" or "alarm" were unconstitutionally vague] stated:

> "It is well-established that criminal laws must be sufficiently clear in at least three respects. First, *a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited.* Second, *the law must establish determinate guidelines for law enforcement.* Finally, where First Amendment freedoms are implicated, *the law must be sufficiently definite to avoid chilling protected expression.* "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness 'demands a greater degree of specificity than in other contexts.'" Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Moreover, when a vagueness challenge involves First Amendment considerations, a criminal law may be

> held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct."*id.*

The Harassment statute, as enacted, does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. It is impossible for a citizen to know what, in the disjunctive, is meant by this statute's series of vague terms. These terms are susceptible to uncertainties of meaning, and because the statute does not establish clear standards for whose sensibilities are to be offended, it is unconstitutionally vague. Nor does the statute define the term "repeated" or indicate the requisite frequency of "repeated communications." See *id.*

Long also held that the phrase "reasonably likely" does not constitute an objective or 'reasonable man' standard. The language 'reasonably likely' is a "far cry from a reasonable person standard". *Long v. State,* 931 S.W.2d 285, 289 (Tex. Crim. App. 1996). To constitute an objective standard, the phrase "reasonably likely" must be coupled with words such as "should have known" See, *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980); *Jones v. State*, 742 S.W.2d 398, 407 (Tex.Crim.App. 1987). The statute begs the question of whose sensitivities it protects. It is "reasonably likely" that a person of uncommon sensitivity will be "alarmed" or "annoyed" by many phone calls. In the circumstance where an abnormally sensitive person is alarmed or harassed by communication, is the statute violated? This Honorable Court held, "At most, the words 'reasonably likely' plainly import a

minimal causality requirement" *Long*, 931 S.W.2d at 289.

The Harassment statute, as enacted does not establish determinate guidelines for law enforcement. It is impossible for law enforcement to know what standards are to be followed recognize whose sensibilities are to be offended by the statute's series of vague terms. Nor does law enforcement have any guidance related to the term "repeated" or direction to requisite frequency of "repeated communications." See *id.*

The Harassment statute, as enacted does not avoid chilling protected expression because the statute is not sufficiently definite. The statute does not define its series of vague terms nor does it define the term "repeated" or indicate the requisite frequency of "repeated communications." See *id.*

An enactment is void for vagueness under the due process clause of the fourteenth amendment if it fails to draw reasonably clear lines between lawful and unlawful. *Kramer v. Price,* 712 F.2d 176 (5th Cir. 1983). A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Constr. Co.,* 269 U.S. 385, 391, (1926). Statutes and regulations must be reasonably certain to avoid vagueness that might otherwise induce individuals to forgo First Amendment rights for fear of violating an unclear law. See *Scull v. Commonwealth of Virginia,* 359 U.S. 344, 353, (1959). Therefore, a law must be narrowly drawn when First

Amendment rights are implicated to prevent the undue constraint of such rights under the guise of regulating conduct by police power. See *Ashton v. Kentucky,* 384 U.S. 195, 200-01 (1966). Otherwise, there is the risk that a vague law will cause individuals to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372, (1964) (quoting *Speiser v. Randall,* 357 U.S. 513, 526, (1958)).

The First Amendment protects people from vague penal statutes. See *Lanzetta v. State of New Jersey,* 306 U.S. 451, (1939), *Grayned v. City of Rockford,* 408 U.S. 104, 109,(1972), *Hynes v. Mayor & Council of Borough of Oradell,* 425 U.S. 610, (1976), *Smith v. Goguen,* 415 U.S. 566, (1974), *Gooding v. Wilson,* 405 U.S. 518, (1972), *Coates v. City of Cincinnati,* 402 U.S. 611, (1971), and *Thornhill v. Alabama,* 310 U.S. 88, (1940). The statutes considered in each of these cases were unconstitutional because vague terms encompassed not only the impermissible conduct, but also constitutionally-protected conduct, such as free speech and free association, chilling the exercise of those freedoms and lending themselves "to harsh and discriminatory enforcement by local prosecuting officials." *Thornhill,* 310 U.S. at 97-98; see also *Coates,* 402 U.S. at 615, (concerning free assembly); *Gooding* 405 U.S. at 519-20, (involving criminal liability for using abusive language); *Smith v. Goguen,* 415 U.S. at 571-72, (penalizing flag misuse); *Hynes,* 425 U.S. at 611, 620, (preventing door-to-door

solicitation); *Grayned,* 408 U.S. at 108, (holding that anti-noise ordinance was not overly vague); *Lanzetta,* 306 U.S. at 458, (criminalizing being a "gangster"); *Connally,* 269 U.S. at 393, (penalizing for not paying certain wage rates).

The Statutory Terms "Annoy," "Alarm," "Abuse," "Torment," and "Embarrass" are Inherently and Unconstitutionally Vague

The Harassment Statute's prohibition on intending to "harass, annoy, alarm, abuse, torment, or embarrass another" by making communications "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another" is unconstitutionally vague because these terms are inherently vague. See *Kramer, Karenev v State,* 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428, 214-215 (Tex.Crim.App. 2009); and *Coates v. Cincinnati,* 402 U.S. 611 (1971). The statue states:

> **(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:**
>
> (1) initiates communication by telephone, in writing, or by electronic communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;

(2) threatens, by telephone, in writing, or by electronic communication, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of his family or household, or his property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or *in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another*;

(5) makes a telephone call and intentionally fails to hang up or disengage the connection;

(6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section; or

(7) sends repeated electronic communications *in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.*

Furthermore, the statue does not define an objective standard in which to measure to what level of annoyance or alarm is prohibited. A person, in

exercising their First Amendment rights to free speech has no way of knowing objectively what type of conduct is annoying or alarming by reading this statute. Does a big brother violate the statute when he "annoys" his little sister, does a student violate the statute when he annoys his teacher? Whether in person, on the telephone, or through an email, the content of the speech can be the same, but the guidance from the statute is still so vague as to not be answered. What kind of words annoy when we answer the telephone? Does it have to be obscene or vulgar, does the relationship between the caller and the complainant matter? These questions cannot be answered by a person of ordinary intelligence or law enforcement because the statute is too vague to answer them. A citizen is left to guess at their meaning and thus his protected expression is chilled.

In *Kramer*, the Fifth Circuit held that the words "annoy" and "alarm" in the context of this statute were inherently vague and that Texas courts have not construed the terms to lessen their vagueness. *See Karenev* at 214-15. The Fifth Circuit has also criticized this statute's pre-1983 predecessor for failing to specify whose sensitivities are "offended." The court explains that vagueness is not lessened by making the conduct depend upon each complainant's sensitivity. In the earlier statute, which was held unconstitutional by the *Kramer* court,

> (a) A person commits an offense if he intentionally:

> (1) communicates by telephone or in writing in vulgar, profane, obscene, or indecent language or in a coarse and offensive manner and by this actions intentionally, knowingly, or recklessly annoys or alarms the recipient

The Court of Criminal Appeals in *May* has also found that this pre-1983 harassment statue was unconstitutionally vague and indefinite in that there was no objective standard to measure the level of annoyance or alarm prohibited. *May v. State* 765 S.W. 2d 438 (Tex.Crim.App. – 1989). The Court stated that "the inherent vagueness of the statute as it then existed, in attempting to define what annoys and alarms people and its failure to specify whose sensitivities are relevant, causes it to be unconstitutionally vague." *Id* at 440.

The legislature in 1993 attempted to correct the deficiencies of the pre-1983 statute that was held unconstitutional by *Kramer* and *May*. However, the Court of Criminal Appeals in *Long* soon found the same constitutional inadequacies in the new statute as before and ruled that the terms "annoy" or "alarm" were still unconstitutionally vague. *Long v. State* 931 S.W.2d 289 (Tex.Crim.App. – 1996).

As noted by *Karenev,* the Legislature's 2003 version of the Harassment statue still does not pass constitutional muster. This current statue, for which the Appellant was charged, is still unconstitutionally void for vagueness. This time, the statute has employed, in the disjunctive, a series of vague terms that are themselves susceptible to uncertainties of meaning, and because the statute does not establish clear

standards for whose sensibilities have to be offended, it is unconstitutionally vague in that the standard of conduct it specifies are dependent on each complainant's sensitivity, and the statute does not define the term "repeated" nor does it indicate the requisite frequency of "repeated communications." *Karenev v State,* 258 S.W.3d 210, 217-218 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009).

The Statutory Term "Repeated" Communications is Unconstitutionally Vague

The Harassment Statute's prohibition on "repeated" telephone or electronic communications is unconstitutionally vague because the statute does not define how many communications are prohibited or the period of time over which such communications are not to occur. The statue states:

> **(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:**
>
> (1) initiates communication by telephone, in writing, or by electronic communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;
>
> (2) threatens, by telephone, in writing, or by electronic communication, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the

person or to commit a felony against the person, a member of his family or household, or his property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

(4) causes the telephone of another to ring repeatedly or makes *repeated telephone communications* anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;

(5) makes a telephone call and intentionally fails to hang up or disengage the connection;

(6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section; or

(7) sends *repeated electronic communications* in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

In holding that TPC § 42.07 was unconstitutionally vague, the Court of Appeals in *Karenev* noted that

> "although the statute [TPC § 42.07] requires "repeated" electronic communications, it does not define the term *repeated,* nor does it indicate the requisite frequency of the repeated communications. The *Random House Webster's*

> *Unabridged Dictionary* defines *repeated* as "done, made, or said again and again." *See* Random House Webster's Unabridged Dictionary 1633 (2d ed. 1999). *Again and again* indicates at least three acts. Does this mean that if a person sends three annoying emails over a five-year period, the person is guilty of the offense of harassment? Can we tell from the statute? The jury charge in this case does nothing to clarify the term because the application paragraph required that the jury find that Appellant sent email, not repeated email, and nowhere in the charge is the term *repeated* defined." *Karenev v State,* 258 S.W.3d 210, 217-218 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009)

While *Karenev* dealt with TPC § 42.07(a)(7) [electronic communications], here, Scott was charged with TPC § 42.07(a)(4) [telephone calls] and TPC § 42.07(a)(7) [electronic communications, i.e., voicemail messages]. This rational of vagueness of "repeated" communications is identical for TPC § 42.07(a)(4) [telephone calls] because the statute forbids "repeated telephone communications".

Harassment Statute is Overbroad

The Harassment statue, as enacted, is overbroad and facially unconstitutional because its series of vague terms inhibit the free exercise of the First Amendment rights of citizens. A statute is overly-broad under the First Amendment if the terms of

the challenged statute are broad enough to suppress legitimately protected First Amendment rights. *Gooding v. Wilson,* 405 U.S. 518, 522, (1972). The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial, judged in relation to the statute's legitimate sweep. See *City of Chicago v. Morales,* 527 U.S. 41, 52, (1999) (citing *Broadrick v. Oklahoma,* 413 U.S. 601 (1973)). To attack a statute on overbreadth grounds, one must show either that every application of the statute creates an impermissible risk of the suppression of ideas, or that the statute is "substantially" overbroad, meaning there is a realistic danger that the statute itself will significantly compromise First Amendment protections of third parties. See, *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 11 (1988); *City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797-99 (1984).

Political Speech

The political ramifications of this statute have the potential for extreme abuse. Texas Penal Code § 42.07 is overbroad because it restricts pure political speech. Texas Penal Code § 42.07(b)(1) defines electronic communication as "a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system". Tex. Penal Code § 42.07(b)(1) (Vernon

2003). The statute restricts speech during television and radio call in shows with political topics.

Radio personalities Rush Limbaugh, Don Imus, and Howard Stern intentionally annoy, harass and alarm listeners over radio waves daily, but often the topics expressed in that medium are central to the protections of the First Amendment. If these commentators are intending to annoy listeners in Texas, then the statute is implicated. The statute also prohibits political television talk shows such as Glen Beck, Shawn Hannity, Keith Olbermann, and Bill O'Reilly, where guests appear and verbally fight ferociously with one another. If one guest was appearing *via* satellite from Texas and was annoyed or harassed by another guest on the show, then the statute would be implicated. If a television personality was insulting, harassing, or annoying the President of the United States while on a visit to Texas, then the statute would be implicated. Texas Penal Code § 42.07 makes this illegal.

Texas Penal Code § 42.07 is implicated every time a stand-up comedian takes the stage in Texas. If a comedian on a stage in Texas, political or otherwise, insults and harasses an audience member, the fact that he uses a microphone that "transmits" the "sound" "signal" through a "wire" to the speakers in the audience would cause a criminal violation of § 42.07. Texas Penal Code § 42.07 makes this illegal.

When "Tea Party" Protestors, unhappy with their government gather to peacefully and lawfully protest

the Texas Penal Code § 42.07 has the potential to be implicated. A citizen at a peaceful, permitted political rally who employs the use of a P.A. system or bull horn to express his opinions through speech intending to harass politicians and opponents who are present may be arrested for a violation of § 42.07. This is precisely the type of speech the framers of the Constitution intended to protect. The only difference between then and now is that technology allows for the use of electronic speakers rather than soap boxes. Texas Penal Code § 42.07 makes this illegal.

The essence of civil disobedience is harassment of the ideas of the status quo. When Martin Luther King gave his "I have a Dream" speech on August 28, 1963, he used a microphone and a television. The civil rights movement was about civil disobedience and challenging, harassing, and annoying the ideas of the establishment. No doubt there were those present that day who heard his famous words and were extremely annoyed by his voice and purpose. Were he to give that speech in Texas today rather than on the steps of the Lincoln Memorial in 1963, under the current version of § 42.07 any objecting law enforcement officer could arrest him simply for speaking. Texas Penal Code § 42.07 makes this illegal. There is absolutely no denying the chilling effect of Texas Penal Code § 42.07.

During the height of every election cycle currently millions of Texans receive so called "robo-calls" promoting or degrading political candidates or ideas. The purpose for these electronic communications is

specifically to alarm the intended recipient of the importance of their vote. Texas Penal Code § 42.07 makes this illegal.

Who hasn't received intentionally annoying emails regarding any number of offense products and ideas; this is the very definition of "Spam." Texas Penal Code § 42.07 makes this illegal.

In our fast growing social media world Twitter, Facebook, Myspace, and any number of blogs all facilitate electronic communication. It is absolutely legal and expected that in societies people will argue, debate and verbally confront each others' ideas. When one annoys another on the street corner, or at a town hall meeting, or even in the newspaper opinionated editorial section no one can be arrested. But if someone tweets, chats, posts or blogs the same Texas Penal Code § 42.07 makes it illegal.

As the Supreme Court stated, "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field every person must be [a] watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us". *Thomas v. Collins,* 323 U.S. 516, 545 (1945). Texas Penal Code § 42.07, as written, is capable of invading that fundamental purpose of the First Amendment. The statute can be applied to foreclose the citizens of this State to argue over political truth. Argument over political truth is the very heart of the First Amendment, even and perhaps especially if that argument is intentionally annoying and alarming.

CONTENT BASED RESTRICTIONS ARE SUBJECT TO STRICT SCRUTINY

Texas Penal Code § 42.07 is a content based restriction because it restricts the type of communication that can be legally conveyed. It proscribes alarming and offensive communication when conveyed through any of several electronic methods of communication. "Regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" are subject to "the most exacting scrutiny". *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

The standard of scrutiny applied to a content-based restriction on expressive conduct is whether the government can demonstrate that the restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Benefit v. Cambridge,* 424 Mass. 918, 925, 679 N.E.2d 184 (1997), quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). See, *R.A.V. v. St. Paul,* 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) ("Content-based regulations are presumptively invalid"). § 42.07 fails the strict scrutiny test because it is overbroad in that it restricts speech that is included within the First Amendment's protections.

There are instances where a content-based restriction may be valid. However, these exceptions are clearly defined and Texas Penal Code § 42.07 fails to comply with any of them.

Advocacy of the use of force or violation of the law, which is directed to inducing or producing imminent lawless action and is likely to induce or produce such action, may be proscribed. See, e.g., *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Kinglsey Intern. Pictures Corp. v. Regents of University of State of N.Y.*, 360 U.S. 684 (1959). Additionally, the "clear and present danger" doctrine provides protection for expression unless its expression "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils". *Schenck v. United States*, 249 U.S. 47, 52 (1919). The government may cut off a person's right to speak his or her views only when those views threaten, clearly and imminently, to ripen into conduct against the public. *See American Communications Ass'n, C.I.O., v. Douds*, 399 U.S. 382 (1950). Additionally, making a reasonable threat to someone's life may be restricted. See *Watts v. U.S.*, 394 U.S. 705, 707 (1969).

None of the established doctrines are present within Texas Penal Code § 42.07. The statute does not encompass fighting words nor clear and present danger. TPC § 42.07(4) and (7) require the use of an electronic communications device. The legislative intent from the 2001 amendment reveals concern that the statute's electronic communications amendment would again be unconstitutional. Opponents to the amendment wanted to limit the statute's coverage to "cover electronic communication that threatens bodily

injury or to commit a felony against a person or a member of the person's family or household". House Comm. On Criminal Jurisprudence, Committee Report, Tex. S.B. 139, 77th Leg., R.S. (2001). Threats of bodily injury comply more closely with the Supreme Court's perspective in *Watts*. See *Watts v. U.S.*, 384 U.S. 705, 707 (1969).

However, as the statute currently exists, the imminent requirement of both the fighting words doctrine and the clear and present danger doctrine are completely absent. An individual must meet a perhaps impossible burden to create an imminently violent environment from miles away and over the telephone or through other electronic communications devices.

Texas Penal Code § 42.07 is not a time, place, and manner restriction because it is not a "viewpoint neutral" restriction. To be viewpoint neutral, a regulation must not be based on the speech's topic. In *Carey v. Brown*, the Supreme Court held unconstitutional an ordinance prohibiting all picketing in residential neighborhoods unless it was labor picketing related to a place of employment. See *Carey v. Brown*, 447 U.S. 455, 471 (1980). The Court's rationale was that although the statute did not restrict which view about labor may be expressed, the ordinance prohibited all speech except that which related to the subject of labor. See Id. at 468. Therefore, the Court held, the regulation was content based and invalid. Id. In the same way, Texas Penal Code § 42.07(4) and (7) prohibit speech based on its topic.

SUBSTANCE OF INFORMATION IS DEFECTIVE

Scott was charged with the offense of Harassment in violation of TPC § 42.07 [CR 1[1]]. The substance of the information was defective and should have been set aside for the two following fundamental reasons:

(1) the information alleged a statutory offense that was facially unconstitutional in that it is void for vagueness in violation of the 1st Amendment to the United States Constitution and Article 1 § 8 of the Texas Constitution. *Karenev v State,* 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009); *Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). [First and Fourteenth Amendments to the U.S. Const., *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126 (1926), *Lanzetta v. State of New Jersey,* 306 U.S. 451(1939) and *Sheldon v. State,* 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed)]; and,

(2) the information failed to allege all of the elements necessary to prove an offense, [Fifth and Sixth Amendments to the U.S. Const., Art. 1 Sec 19 of the Texas Const. and, T.C.C.P. Art. 21.03].

The Code of Criminal Procedure categorizes errors in a charging instrument as either defects of

---

[1] "CR" refers to the Clerk's Record filed on July 17, 2008, which is followed by the corresponding page number in the record

substance or defects of form. *See* T.C.C.P Arts. 27.08 and 27.09. A defect of substance goes to the essence of the allegation of the offense. The defects of substance that may be raised in a motion to quash are: (1) that the information fails to charge an offense [T.C.C.P Art 27.08] and (2) that the statutory offense alleged is facially unconstitutional. *See Sheldon v. State,* 100 S.W.3d 497, 501 (Tex. App. – Austin 2003, pet filed) (claim that a statute is void for vagueness on its face may be presented in a motion to quash.) Scott filed a Motion to Quash the Information on these grounds and it was denied [M-RR 3, 14].

Statute Alleged is Facially Unconstitutional
Void for Vagueness and Overbroad

The offenses of Harassment as defined in TPC § 42.07, as stated above, is unconstitutional on its face in that it is vague and violates the First Amendment of the United States Constitution as well as Article 1§ 8.

It is well settled that an information may be quashed if the statute creating the offense charged is unconstitutional. Therefore, a motion to quash is one means of testing the validity of a statute which is potentially unconstitutional. *White v. State,* 440 S.W. 2d 660, 667 (Tex.Crim.App. – 1969). Furthermore, a charging instrument may not be amended if the trial court has set it aside on the grounds that the underlying statute is unconstitutional. *State v. Evans,* 800 S.W.2d 220, 225 (Tex.Crim.App. – 1990).

The Appellant was charged with Harassment, a statute that is and had been held unconstitutionally vague because "a person of ordinary circumstances cannot tell what is prohibited and what is not." *Karenev v State,* 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009); *also see Long v. State,* 931 S.W.2d 285 (Tex. Crim. App. 1996). The information should have likewise been quashed because the manner and means were unconstitutionally vague.

The information in this case should have been set aside for being unconstitutionally vague and overbroad. If the trial court would have ruled in this manner, then it would not have been proper for the information to be amended. A charging instrument may not be amended if the trial court has set it aside on a ground that the underlying statute is unconstitutional. *See State v. Evans,* 800 S.W.2d 220, 224 (Tex.Crim.App. – 1990).

Failure to Allege Elements of an Offense

In order to state an offense, an indictment [information] must allege each and every element of the offense. T.C.C.P. Art. 21.03; *Ex parte Winton,* 549 S.W.2d 751, 752 (Tex.Crim.App. – 1977). There is no exception to the substance of an indictment [information] if it does not appear that an offense against the law was committed by the defendant. T.C.C.P Art. 27.08. The Texas Penal Code defines "element of offense" as: "(A) the forbidden conduct; (B) the

required culpability; (C) any required result; and (D) the negation of any exception to the offense" Tex. Pen. Code Sec. 1.07(a)(22); *Holly v. State,* 167 S.W.3d 546, 548 (Tex. App. – Houston [14th Dist.] 2005, no pet.) The information against the Appellant fails to allege these fundamental and independent elements of the offense prohibited because the statute charged was unconstitutionally vague.

The information against the Appellant failed to allege an offense against the laws of the State of Texas because it failed to allege indispensable elements of an offense. The information fails to allege an offense in two regards, (1) it fails to allege that the defendant committed an offense with the requisite mental state and (2) it fails to allege all elements of the offense. The information's failure to allege elements of the offense violate the Appellant's state and federal constitutional rights to Due Process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 10 and 19 of the Texas Constitution.

No Culpable Mental State Alleged

The information failed to allege a culpable mental state because the charge was unconstitutionally vague and overbroad. Criminal offenses require a culpable mental state. Where the particular mental state required is not set forth in the Code section defining the offense and the statutory definition does not plainly dispense with the mental element, the

applicable culpable mental state is found by reference to a general statute. *See* Tex. Pen. Code Sec. 6.02 and 6.03. The Texas Penal Code's Section 6.02 *Requirement of Culpability* states that "a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires." Accordingly, "if the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." Texas Code of Criminal Procedure Article 21.05 mandates that "[w]here a particular intent is a material fact in the description of the offense, it must be stated in the indictment." Thus, where a culpable mental state is required, the state's failure to plead it is a defect in the indictment. *See* T.C.C.P. Art. 21.05; *Ex parte Winton*, 549 S.W.2d 751, 752 (Tex.Crim.App. – 1977); *Baldwin v. State*, 538 S. W.2d 109, 112(Tex. Crim. App. 1976); *Ex parte Rodgers*, 589 S.W.2d 751 752 (Tex.Crim.App. – 1979) (failure to allege requirement of culpable mental state for offense of failing to stop and render aid made the indictment fundamentally defective.)

The information alleges that the Appellant committed the offense in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant. This language is unconstitutionally vague. See, *Karenev v State*, 258 S.W.3d 210 (Tex.App. – Ft. Worth, 2008, *rev'd on other grounds by*, 281 S.W.3d 428 (Tex.Crim.App. 2009).

Again, the Court of Criminal Appeals in *Long* stated that a statute must be sufficiently clear so that a person of ordinary intelligence is given a reasonable opportunity to know what is prohibited, that the law must establish determinate guidelines for law enforcement, and that where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression.

The failure of the information to allege an essential element of the offense, namely the required culpable mental state, prevented the Appellant from understanding the nature of the charges against him and denied him the ability to prepare an adequate defense. The Appellant's inability understand the nature of the charge against him and prepare a adequate defense substantially prejudiced his state and federal constitutional rights to Due Process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 10 and 19 of the Texas Constitution.

For the foregoing reasons, because the information did not allege a culpable mental state, it failed to allege an indispensable element of the offense and was therefore substantively defective and should have been quashed. Had the court so found and quashed the information, then the information could not have been amended. A charging instrument may not be amended if the trial court has set it aside on a ground that the underlying statute is unconstitutional. See, *State v. Evans,* 800 S.W.2d 220, 224 (Tex.Crim.App. – 1990).

The court should have dismissed the prosecution of the Appellant. On granting a motion to quash the charging instrument, the trial court has the authority to dismiss prosecution. *See State v. Gray*, 801 S.W.2d 10, 11 (Tex. App. – Austin 1990); *Smith v. State*, 801 S.W.2d 629, 631 (Tex. App. – Dallas 1991); T.C.C.P. Art. 28.05. If the exception to the indictment is sustained on the ground that it fails to charge an offense, the defendant shall be discharged. *See* T.C.C.P. Art 28.07.

THIS HONORABLE COURT CANNOT APPLY A LIMITING CONSTRUCTION TO TEXAS PENAL CODE § 42.07 TO AVOID RENDERING IT UNCONSTITUTIONAL

This Honorable Court may not construe Texas Penal Code § 42.07 to avoid unconstitutional applications. Where an accused is "convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act", because the conviction is based on an unconstitutional construction of the law. *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966). A "court may not assume the legislative prerogative and rewrite a statute in order to save it if the statute is not readily subject to a narrowing construction." *Olvera v. State*, 806 S.W.2d 546, 552 (Tex.Crim.App. 1991).

This Honorable Court in Long v. State noted the difficulties in removing "emotional terms present" in a harassment statute:

> While "annoy" and "embarrass" probably describe the least intense emotional states available under the statute, we think that "harass," "alarm," "abuse," and "torment" are of low enough emotional intensity that they too implicate First Amendment freedoms. The legislature obviously intended low intensity emotions to trigger the statute. And, we think a constitutional statute can be drafted in which these low intensity emotional terms play a role. In the absence of statutory definitions, therefore, we will not interpret any of these terms as carrying an emotional intensity not suggested by the words themselves. To do otherwise would significantly alter the meaning of the statute the legislature drafted. *Long v. State,* 931 S.W.2d 285, 296 (Tex.Crim.App. 1996).

The legislature intended to include the words emotional terms in the statute. To alter those terms would alter the meaning of the statute and invade the province of the legislature.

THE STATE IS BARRED FROM RAISING THE ISSUE OF WHETHER TEXAS PENAL CODE § 42.07 IMPLICATES THE FIRST AMENDMENT BECAUSE THE STATE FAILED TO PRESERVE ERROR AT THE APPELLATE COURT

The State failed to preserve error at the appellate court on the issue of whether Texas Penal Code § 42.07 implicates the First Amendment. Therefore, the state is barred by the Texas Rules of Appellate Procedure from raising the issue in this Honorable Court. The purpose of requiring an objection is to give to the court or the opposing party the opportunity to correct the error or remove the basis for the objection. *Martinez v. State*, 22 S.W.3d 504, 507 (Tex.Crim.App. 2000). The State was provided that opportunity at the Court of Appeals and failed to preserve error. See, *Karenev v. State*, 281 S.W.2d 428 (Tex.Crim.App. 2009).

PRAYER

The Fourth Court of Appeals ruling should be sustained and Texas Penal Code § 42.07 should be ruled facially unconstitutional for violating the First

and Fourteenth Amendments to the U.S. Constitution and Article I § 8 of the Texas Constitution.

Respectfully submitted:

DONALD H. FLANARY, III.
Bar No. 24045877
GOLDSTEIN, GOLDSTEIN
& HILLEY
310 S. St. Mary's St.
29th Floor Tower Life Building
San Antonio, Texas 78205
210-226-1463
210-226-8367 facsimile

/s/ Donald H. Flanary, III By:
DONALD H. FLANARY, III.

Attorney for Appellant,
SAM SCOTT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above foregoing Appellant's Brief has been hand delivered to Susan D. Reed, District Attorney, Bexar County Justice Center, 300 Dolorosa, Suite 5072, San Antonio, Texas 78205, on this the 19th day of March, 2010.

/s/ Donald H. Flanary, III
DONALD H. FLANARY, III.

Companion Harassment Statutes in Other Jurisdictions

Alabama
Ala. Code § 13A-11-8. Harassment – Harassing communications.

Alaska
Alaska Stat. Sec. 11.61.120. Harassment in the second degree

Arizona
Ariz. Rev. Stat. 13-2921. Harassment; classification; definition

Ariz. Rev. Stat. § 13-2916. Use of telephone to terrify, intimidate, threaten, harass, annoy or offend; classification

Arkansas
A.C.A. § 5-71-209. Harassing communications.

California
Cal. Penal Code § 653m.

Colorado
C.R.S. 18-9-111. Harassment – stalking

Connecticut
Conn. Gen. Stat. Sec. 53a-183. Harassment in the second degree: Class C misdemeanor.

Delaware
11 Del. C. § 1311. Harassment; class B misdemeanor

District of Columbia

D.C. Code § 22-404. Assault or threatened assault in a menacing manner; stalking [Formerly § 22-504]

Florida

Fla. Stat. § 365.16. Obscene or harassing telephone calls

Georgia

O.C.G.A. § 46-5-21. Using telephone communications for obscene, threatening, or harassing purposes

Guam

9 GCA § 61.20. Harassment; Defined & Punished.

Hawaii

HRS § 711-1106. Harassment.

Idaho

Idaho Code § 18-6710. Use of telephone to annoy, terrify, threaten, intimidate, harass or offend by lewd or profane language, requests, suggestions or proposals – Threats of physical harm – Disturbing the peace by repeated calls – Penalties

Idaho Code § 18-6711. Use of telephone to terrify, intimidate, harass or annoy by false statements – Penalties

Illinois

720 ILCS 135/1-1. Harassment by telephone

720 ILCS 135/2. Sentence

Indiana

Ind. Code § 35-45-2-2. Harassment; "obscene message" defined.

Iowa
Iowa Code § 708.7. Harassment.

Kansas
K.S.A. § 21-4113. Harassment by telephone.

Kentucky
KRS § 525.080. Harassing communications.

Louisiana
La. R.S. 14:285. Telephone communications; improper language; harassment; penalty.

Maine
17-A M.R.S. § 506. Harassment by telephone

Maryland
Md. CRIMINAL LAW Code Ann. 3-804. Misuse of telephone facilities and equipment.

Massachusetts
ALM GL ch. 265 § 43A. Criminal Harassment.

Michigan
MCL § 750.540e. Malicious use of service provided by telecommunications service provider.

Minnesota
Minn. Stat. § 609.749 HARASSMENT; STALKING; PENALTIES.

Mississippi
Miss. Code § 97-29-45. Obscene electronic communications.

Missouri
565.090 R.S.Mo. Harassment.

Montana
Mont. Code § 45-8-213. Privacy in communications.

Nebraska
R.R.S. Neb. § 28-1310. Intimidation by telephone call; penalty; prima facie evidence.

Nevada
Nev. Rev. Stat. §201.255. Obscene, Threatening or Annoying Telephone Calls, Penalties.

New Hampshire
N.H. Rev. Stat. § 644:4. Harassment.

New Jersey
N.J. Stat. § 2C:33-4. Harassment

New Mexico
N.M. Stat. Ann. § 30-20-12. Use of telephone to terrify, intimidate, threaten, harass, annoy or offend; penalty

New York
NY CLS Penal § 240.30. Aggravated harassment in the second degree.

North Carolina
N.C. Gen. Stat. § 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone

North Dakota
N.D. Cent. Code 12.1-17-07. Harassment.

Ohio
Ohio Code § 2917.21. Telecommunications harassment.

Oklahoma
21 Okl. St. § 1172 § 1172. Obscene, threatening or harassing telecommunication or other electronic communications – Penalty

Oregon
ORS § 166.090. Telephonic harassment.

Pennsylvania
18 Pa.C.S. § 2709. Harassment.

Rhode Island
R.I. Gen. Laws § 11-35-17. Crank or obscene telephone calls.

South Carolina
S.C. Code Ann. § 16-17-430. Unlawful communication.

South Dakota
S.D. Codified Laws § 49-31-31.

Tennessee
Tenn. Code Ann. § 39-17-308. Harassment.

Texas
Tex. Penal Code § 42.07. Harassment

Utah
Utah Code Ann. § 76-9-201. Electronic communication harassment – Definitions – Penalties

Vermont
13 V.S.A. § 1027. Disturbing peace by use of telephone or other electronic communications

Virginia
Va. Code Ann. § 18.2-427. Use of profane, threatening or indecent language over public airways

Va. Code Ann. § 18.2-428. Giving certain false information to another by telephone

Va. Code Ann. § 18.2-429. Causing telephone to ring with intent to annoy

Va. Code Ann. § 18.2-430. Venue for offenses under this article

Washington
Rev. Code Wash. § 9.61.230. Telephone harassment.

West Virginia
W.Va. Code § 61-8-16. Obscene, anonymous, harassing, repeated and threatening telephone calls; penalty.

Wisconsin
Wis. Stat. 947.012. Unlawful use of telephone.

Wyoming
Wyo. Stat. § 6-6-103. Telephone calls; unlawful acts, penalties; place of commission of crime.

Model Penal Code
Model Penal Code § 250.4. Harassment.

U.S. Code
47 USCS § 223. Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications

183

(2)

No. 10-884

Supreme Court, U.S.
FILED
MAR 11 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SAMUEL SCOTT,

Petitioner,

v.

TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN D. REED
Criminal District Attorney
BEXAR COUNTY, TEXAS

KEVIN PATRICK YEARY*
Assistant Criminal District Attorney
BEXAR COUNTY, TEXAS
PAUL ELIZONDO TOWER
300 Dolorosa, Suite 370
San Antonio, Texas 78205-3030
Telephone No. (210) 335-2734
State Bar No. 22149500
Email: kyeary@bexar.org

Attorneys for the State of Texas

**Attorney of Record*
Representing the State of Texas

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad.

2. Whether the Texas harassment statute violates the First Amendment because it is a content based restriction on speech and expressive conduct.

3. Whether private argumentative speech should be a protected class of speech.

4. Whether the First Amendment requires an analysis of the distinctions between open-air, face-to-face communications and electronic communications.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

I. The statute at issue 1

II. The background of this case 2

III. The current claims 6

ARGUMENT 7

I. Petitioner's second, third, and fourth questions presented have not been properly preserved 7

II. Petitioner has procedurally defaulted any as-applied claims 8

III. This is not an "electronic communications" harassment case 9

IV. First Amendment jurisprudence controlling this case is not unsettled 12

A. Controlling precedent 13

B. Vagueness 14

C. Overbreadth 14

D. Application to this case 17

TABLE OF CONTENTS – Continued

Page

V. Similar telephone harassment statutes affirmed 19

VI. The telephone harassment statute is not vague and it does not implicate First Amendment freedoms..... 25

A. Statute is not vague 25

B. Statute does not implicate the First Amendment 30

CONCLUSION..... 36

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 7

Broaderick v. Oklahoma, 413 U.S. 601 (1973) 13, 15

City of Chicago v. Morales, 527 U.S. 41 (1999) 13

Coates v. Cincinnati, 402 U.S. 611 (1971) 27, 28

Frisby v. Schultz, 487 U.S. 474 (1988) 35

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 18, 19

Gormley v. Director, Connecticut State Dep't of Adult Probation, 449 U.S. 1023 (1980) 19

Gormley v. Director, Connecticut State Dep't of Adult Probation, 632 F.2d 938 (2nd Cir. 1980) 20

Hill v. Colorado, 530 U.S. 703 (2000) 16, 32, 34, 35

Johnson v. Zerbst, 304 U.S. 458 (1939) 9

Katz v. United States, 389 U.S. 347 (1967) 33

Kramer v. Price, 712 F.2d 174 (5th Cir. 1983) 25, 26

Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996) 26

Michigan v. Long, 463 U.S. 1032 (1983) 12

Parker v. Levy, 417 U.S. 733 (1974) 14

Pennsylvania v. Hendrickson, 724 A.2d 315 (1999) 21, 22

Reno v. ACLU, 521 U.S. 844 (1997) 23

TABLE OF AUTHORITIES – Continued

Page

Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) 19

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) 24

Scott v. State, 298 S.W.3d 264 (Tex. App. – San Antonio 2009) 1, 10

Scott v. State, 322 S.W.3d 662 (Tex. Crim. App. 2010) ..... *passim*

Snyder v. Phelps, 09-751, 562 U.S. ___ (March 2, 2011) 31

State v. Murphy, 757 A.2d 1125 (Conn. 2000) 22

State v. Thorne, 333 S.E.2d 817 (1985) 20, 21

Thorne v. Bailey, 488 U.S. 984 (1988) 21

Thorne v. Bailey, 846 F.2d 241 (4th Cir. 1988) 21

Thorne v. West Virginia, 474 U.S. 996 (1985) 21

United States v. Bowker, 372 F.3d 365 (6th Cir. 2004) 24

United States v. Eckhardt, 466 F.3d 938 (11th Cir. 2006) 24

United States v. Mazurie, 419 U.S. 544 (1975) 14

United States v. Popa, 187 F.3d 672 (D.C. Cir. 1999) 24

United States v. Williams, 553 U.S. 285 (2008) ..... *passim*

Village of Hoffman Estates v. Flipside Hoffman, 455 U.S. 489 (1982) 14, 15, 30

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

U.S. Const. amend. I ..... *passim*

STATUTES

18 PA. C.S. § 5504(a)(1) and (a)(2) 21

28 U.S.C. § 1257(a) 1, 7, 8

47 U.S.C. § 223(a)(1)(C), (D), & (E) 22, 23, 24

CONN. GEN. STAT. § 53a-183(a)(3) (Rev. 1958, Supp.1979) 20

TEX. PEN. CODE ANN. § 12.22 (Vernon 2003) 2

TEX. PEN. CODE ANN. § 42.07(a) (Vernon 2003) 9

TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) ..... *passim*

TEX. PEN. CODE ANN. § 42.07(a)(7) (Vernon 2003) 4, 5, 10

TEX. PEN. CODE ANN. § 42.07(c) (Vernon 2003) 2

WEST VIRGINIA CODE § 61-8-16(a)(4) (1984) 20

RULES

SUP. CT. R. 14(g)(i) 8

OTHER AUTHORITIES

Webster's Ninth New Collegiate Dictionary 47, 68, 88, 405, 552, 819 and 1245 (1988) 27, 29

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010). The opinion of the Court of Appeals of Texas, Fourth District, at San Antonio is reported at *Scott v. State*, 298 S.W.3d 264 (Tex. App. – San Antonio 2009).

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on October 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

I. The statute at issue

This case involves a challenge to the facial constitutionality of Texas' telephone harassment statute. The statute at issue, in pertinent part, provides:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment or embarrass another, he:
>
> * * *
>
> (4) makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm,

> abuse, torment, embarrass, or offend another.

TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003). As alleged in this case, the charged offense was a Class B misdemeanor. TEX. PEN. CODE ANN. § 42.07(c) (Vernon 2003). A Class B misdemeanor in Texas is punishable by either "a fine not to exceed $2,000.00," or by "confinement in jail for a term not to exceed 180 days," or by "both such fine and confinement." TEX. PEN. CODE ANN. § 12.22 (Vernon 2003).

II. The background of this case

In two separate cases, Petitioner was charged by information with misdemeanor telephone harassment pursuant to Texas Penal Code section 42.07(a)(4). *See Scott v. State*, 322 S.W.3d 662, 664 (Tex. Crim. App. 2010); *see also* TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) (telephone harassment). The first charge, filed on April 24, 2006, alleged in pertinent part that:

> On or about the 5th Day of December, 2005, Samuel Scott, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did make repeated communications to the complainant, to wit: telephone calls, in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend the complainant.

Scott, 322 S.W.3d at 665. The second charge, filed on July 11, 2006, alleged in pertinent part that:

> On or about the 12th Day of March, 2006, Samuel Scott, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did make repeated telephone communications to the complainant in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant, to wit: the defendant called the complainant repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail messages.

Id. After he was charged in both cases, Petitioner filed a motion to quash the two charging instruments pending against him. He argued in his motion that Texas Penal Code section 42.07 was unconstitutional on its face because it was both vague and overbroad. *Id.* He contended the statute's vagueness and overbreadth threatened "to induce individuals to forgo [their] First Amendment rights [to free speech] for fear of violating an unclear law." *Id.* But, Petitioner did not argue in his motion that section 42.07 was vague as applied to his own conduct. *Id.*

On June 25, 2008, the trial court held a hearing on Petitioner's motion to quash the charging instruments. At the hearing, in addition to reiterating the arguments he made in his motion, Petitioner argued that the July 11, 2006 information had alleged an

offense under Penal Code Section 42.07(a)(7) (electronic communications harassment). Petitioner argued that both sections 42.07(a)(4) (telephone harassment) and (a)(7) (electronic communications harassment) were unconstitutionally vague and overbroad on their face because the terms "annoy" and "alarm," which are included in both of those subsections, are "inherently vague." He also argued that neither subsection clearly defined whose sensibilities had to be offended and that neither identified the standard by which the criminal conduct was to be measured. Finally, he argued that the specific intent elements in those subsections were not sufficient to cure their problems. In spite of all his arguments, the trial court overruled Petitioner's complaints and denied his motions. *Scott*, 322 S.W.3d at 666. Petitioner then pled no contest to both charges and was sentenced, in each case, to confinement in jail for two days and a $50.00 fine. *Id.*, at 666-667.

On direct appeal, Petitioner raised the same complaints that had been raised in his pre-trial motion to quash. *Scott*, 322 S.W.3d at 667. In addition, he argued – for the first time in the direct appeal – that sections 42.07(a)(4) (telephone harassment) and 42.07(a)(7) (electronic communications harassment) were unconstitutionally vague *as applied* to his conduct. Petitioner argued that both subsections were vague and overbroad because they both utilized the terms "abuse," "torment," "embarrass," and "repeated," which he claimed were, like "annoy" and "alarm," "inherently vague." *Id.* On June

24, 2009, the court of appeals issued its opinion agreeing with Petitioner's arguments and reversed the trial court's judgments. *Id.*

On October 6, 2010, the Texas Court of Criminal Appeals reversed the judgment of the court of appeals. The Court of Criminal Appeals found that the arguments raised by Petitioner for the first time on direct appeal were not preserved for review because they were untimely. *Scott*, 322 S.W.3d at 667 n.5. The Court found that Petitioner had only been charged with offenses pursuant to Texas Penal Code section 42.07(a)(4) and that, consequently, the court of appeals had erred by addressing the constitutionality of Texas Penal Code section 42.07(a)(7). *Scott*, 322 S.W.3d at 668. The Court concluded that Texas Penal Code Section 42.07(a)(4) "is not susceptible of application to communicative conduct that is protected by the First Amendment," and that it "does not implicate the free-speech guarantee of the First Amendment." *Id.*, at 669. The Court also explained the following:

> The statutory subsection, by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress. Given that plain text, we believe that the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words. That is to say, in the usual case,

> persons whose conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake. To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.

Id., at 669-670.

III. The current claims

In this petition for writ of certiorari, Petitioner presents four questions:

1. Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad.

2. Whether the Texas harassment statute violates the First Amendment because it is a content based restriction on speech and expressive conduct.

3. Whether private argumentative speech should be a protected class of speech.

4. Whether the First Amendment requires an analysis of the distinctions between

open-air, face-to-face communications and electronic communications.

ARGUMENT

I. Petitioner's second, third, and fourth questions presented have not been properly preserved

To properly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), Petitioner must show that he has obtained a judgment or decree from the State's highest court concerning the validity of a state statute in light of the constitution, treaties, or laws of the United States. *See* 28 U.S.C. § 1257(a). In *Adams v. Robertson*, 520 U.S. 83 (1997), this Court explained, "[w]ith 'very rare exceptions,' [citation omitted], we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a Petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). In this case, Petitioner clearly raised and preserved in the Texas courts the argument, raised in his first question presented, "Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad." However, he never asked the state courts directly to decide the issues raised in his second, third, and fourth questions presented.

In addition, this Court's rule 14(g)(i) mandates that a petition seeking review of a state-court judgment contain a concise statement specifying the stages of the proceedings when the federal questions sought to be reviewed were raised, the manner of raising them and the way in which they were passed on by the state courts. SUP. CT. R. 14(g)(i). However, Petitioner has only arguably made such a showing concerning his first question presented. (Pet.Br: 2-3). The statement in Petitioner's brief does not show where or how the issues addressed in his second, third, and fourth questions presented were raised or disposed in the Texas state courts.

With regard to his second, third, and fourth questions presented, Petitioner has failed to properly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), and he has also failed to comply with this Court's rules concerning a petition seeking review of a state-court judgment. Petitioner's second, third, and fourth questions presented are therefore not properly before this Court.

II. Petitioner has procedurally defaulted any as-applied claims

Although Petitioner does not directly claim that Texas' telephone harassment statute is unconstitutional as applied to his own conduct, to the degree that his claims might be interpreted to be as-applied claims, they are defaulted. The Texas Court of Criminal Appeals observed in its opinion in this case that

Petitioner did not preserve his as-applied claims in this case. The Court observed that, on direct appeal, Petitioner "argued, for the first time, that . . . § 42.07(a)(4) and (a)(7) were both unconstitutionally vague as applied to his conduct." The Court concluded that these "arguments, because they were untimely, were not preserved." *Scott v. State*, 322 S.W.3d at 667 & 667 n.5.

Because Petitioner's as-applied claims have been procedurally defaulted, Petitioner should not be permitted to raise them in this Court. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458 (1939) (describing a waiver as "an intentional relinquishment or abandonment of a known right or privilege.").

III. This is not an "electronic communications" harassment case

Texas' harassment statute is composed of several subsections, defining distinct offenses, each related to the others by a common *mens rea*. *See* TEX. PEN. CODE ANN. § 42.07(a) (Vernon 2003) (providing that "[a] person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:. . . ."). Subsection (a)(4) of Texas' harassment statute, at issue in this case, defines the offense of telephone harassment. TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) (providing that a person commits an offense if, with the requisite intent, he "causes the telephone of another to ring repeatedly or makes repeated telephone communications

anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."). Subsection (a)(7) of the statute, on the other hand, defines the offense of electronic communications harassment. TEX. PEN. CODE ANN. § 42.07(a)(7) (Vernon 2003) (providing that a person commits an offense if, with the requisite intent, he "sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.").

Petitioner argued to the court of appeals that, in addition to having been charged under subsection (a)(4) of the statute, "he was also charged with violating subsection (a)(7)." *Scott v. State*, 298 S.W.3d 264, 267 (Tex. App. – San Antonio 2009, rev'd). The court of appeals observed that the charge filed against Petitioner on July 11, 2006 contained an allegation that he left "voice mail messages." *Id.* The court of appeals believed that "voice mail messages" fell within the definition of "electronic communications." *Id.* Consequently, the court of appeals concluded that Petitioner had been charged, additionally, with electronic communications harassment under subsection (a)(7) of the statute. *Id.*

The Court of Criminal Appeals rejected the court of appeals' conclusion that Petitioner had been charged in this case with electronic communications harassment. Specifically, the Court of Criminal Appeals observed, "[a] careful reading of the July 11, 2006 information . . . reveals that it tracks the language of (a)(4) . . . but not the language of (a)(7)."

Scott v. State, 322 S.W.3d 662, 668 (Tex. Crim. App. 2010). The Court concluded "that the July 11, 2006 information against Scott was brought under § 42.07(a)(4) and that the court of appeals erred in addressing the constitutionality of § 42.07(a)(7)." *Id.*

Nevertheless, again and again in his brief before this Court, Petitioner implies that this case is one involving "electronic communications" harassment. *See* Pet.Br: 4 ("the statute is so broad that it also prohibits speech on radio, television, and at public events where microphones or bullhorns are used"); 4-5 ("the statute criminalizes all forms of political dissent on the Internet . . . "); 5 ("The Texas Court of Criminal Appeals has . . . drawn . . . distinctions between open-air or face-to-face communications and electronic communications"); 17 ("In 2001, the statute was amended to prohibit certain electronic communications."); 20 ("The statute defines electronic communications as . . . "); 20 ("If [commentators such as Rush Limbaugh, Don Imus, and Howard Stern] are intending to annoy listeners in Texas, then the statute is implicated."); 21-22 ("When Martin Luther King gave his 'I have a Dream' speech on August 28, 1963, he used a microphone. . . ."); 23 ("In our . . . world Twitter, Facebook, Myspace, and . . . blogs all facilitate electronic communication."); 24 ("religious, political, and commercial speech will . . . be implicated when people . . . use . . . emails, or any other electronic devices."); 29 ("Every state and province of the United States has enacted a criminal statute regulating electronic communication" and

"the pervasiveness of this type of regulation calls out for this Court to . . . require that . . . First Amendment protections apply or provide . . . guidance . . . on how to . . . regulate electronic communications."). This is not an electronic communications harassment case.

The Texas Court of Criminal Appeals found that this case did not involve "electronic communications" harassment. Because Texas' highest court has now determined that Petitioner was not charged with electronic communications harassment, this Court should not presume that he was so charged. Out of respect for the independence of state courts, as well as in order to avoid rendering a mere advisory opinion, this Court should refuse to consider in this case Petitioner's attempt to challenge Texas' electronic communications harassment law. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (explaining, "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

IV. First Amendment jurisprudence controlling this case is not unsettled

Petitioner lists as his first reason for granting this petition that "the law here is unsettled." (Pet.Br: 4). The State disagrees.

The law controlling Petitioner's case is not unsettled, and it is not in need of clarification by this Court. While this Court appears to have never addressed the precise questions raised by the Petitioner in this case, this Court has provided a more than sufficient outline of the constitutional principles at issue here. In addition, other courts have addressed similar claims and have found that telephone harassment statutes, such as Texas' statute, are not facially unconstitutional.

A. Controlling precedent

Petitioner's grounds for review as well as the arguments presented in his petition for writ of certiorari appear to address the facial constitutionality of the Texas telephone harassment statute on the grounds that it is both vague and overbroad. (Pet.Br: i). The "[v]agueness doctrine is an outgrowth . . . of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008). The overbreadth doctrine, in contrast, is an outgrowth of the First Amendment. *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (explaining, "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relationship to the statute's plainly legitimate sweep,'"), *quoting from Broaderick v. Oklahoma*, 413 U.S. 601, 612-615 (1973).

B. Vagueness

This Court's precedent makes clear that ordinary claims of facial unconstitutionality for vagueness can only be sustained when a Petitioner has demonstrated that the statute at issue is vague in ***all*** of its applications. *See Village of Hoffman Estates v. Flipside Hoffman*, 455 U.S. 489, 494-495 (1982) (providing that, in a facial vagueness challenge, a court "should *uphold the challenge only if the enactment is impermissibly vague in all of its applications.*") (emphasis added). A claimant bringing a facial vagueness challenge must also demonstrate that he has not himself engaged in some conduct that is clearly proscribed by the statute. *See Hoffman*, 455 U.S. at 497 (explaining, "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to . . . others."); *see also United States v. Mazurie*, 419 U.S. 544, 550 (1975) (explaining, "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker v. Levy*, 417 U.S. 733, 756 (1974) (explaining, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). But Petitioner has not made those showings in this case.

C. Overbreadth

In *United States v. Williams*, 553 U.S. 285 (2008), this Court outlined the only exception to the ordinary

rules for facial vagueness challenges. In that case, this Court made clear that, when a statute is alleged to be vague because it is unclear whether it implicates the First Amendment, the claim can proceed without an initial showing that the statute is vague as applied, but it is only permitted to do so – relaxed from the ordinary requirements – as an *overbreadth* claim. In that case, addressing the vagueness question specifically, this Court explained:

> Although ordinarily "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.

United States v. Williams, 553 U.S. at 304, *quoting from Hoffman*, 455 U.S. 489, 494-495, and nn.6 and 7; *and see Broaderick v. Oklahoma*, 413 U.S. 601, 610-615 (1973) (recognizing that, "facial overbreadth adjudication is an exception to our traditional rules of practice.").

What is also clear is that, in the overbreadth context, a challenger must demonstrate that the statute is not merely overbroad, but *substantially* overbroad. *Broaderick*, 413 U.S. at 615 (explaining that, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as

well, judged in relation to the statute's plainly legitimate sweep."). This Court does not permit statutes to be declared facially unconstitutional based on the conclusion that they might chill only "some" protected expression.

In *Hill v. Colorado*, for example, which involved a challenge to a statute that prohibited certain speech-related conduct within 100 feet of the entrance to any health care facility, this Court observed that the Petitioners had proffered "hypertechnical theories as to what the statute cover[ed]," and concluded that, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000). Thus, in *Hill*, the Court again made clear that a facial vagueness attack could not be sustained where the statute at issue is valid in the vast majority of its intended applications and where a court of appeals can only envision a few scenarios where the statute might conceivably be applied in an allegedly unconstitutional way.

Similarly, in *United States v. Williams*, a case involving a similar dual challenge to the alleged vagueness and overbreadth of a statute, this Court explained that the lower court there had made a "basic mistake" in its belief that, "the mere fact that close cases can be envisioned renders a statute vague." *Williams*, 553 U.S. at 305. The Court stated plainly, "[t]hat is not so." *Id.* Then the Court explained, "What renders a statute vague is not the

possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminancy of precisely what that fact is." *Id.*

Although Petitioner in this case has certainly speculated about a number of hypothetical applications of the Texas statute that he believes would render the enforcement of the statute a violation of the First Amendment, many of his speculative hypotheticals are quite implausible, and they certainly do not amount to even a statistically significant number of the conceivable applications of the statute in real life. In real life, this statute is applied against abusive and obnoxious ex-spouses, ex-love interests, or disgruntled business relations who willfully and persistently disrupt the lives of their victims. In real life this statute is applied against persons who use the telephone to bully and abuse their victims; and sometimes the offense is only a precursor to, or a warning of, physical violence to come. And, in the event that this statute is ever used in a manner that arguably violates an accused's First Amendment rights, resort to an as-applied challenge will certainly be sufficient to ensure that the statute is not misused.

D. Application to this case

This case turns on a preliminary question – one that precedes the question of the substantiality of any allegation of overbreadth. This case turns on whether

the Texas telephone harassment statute implicates the First Amendment at all. In fact, the Court of Criminal Appeals rightly concluded in this case that the statute, as drawn, "is not susceptible of application to communicative conduct that is protected by the First Amendment." *Scott*, 322 S.W.3d at 669. The court observed that "in the usual case, person's whose conduct violates [this statute] will not have an intent to engage in legitimate communication of ideas, opinions or information; they will have only the intent to inflict emotional distress for its own sake." *Id.*, at 670. Then the court noted that, "to the extent that [the statute] is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id.*

This Court has consistently confirmed the idea that a valid law does not burden First Amendment rights merely because it may incidentally curb some communicative activity. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), for example, this Court affirmed an injunction that prohibited peaceful picketing by union members that was "carried on as an essential and inseparable part of a course of conduct which [was] in violation of the state law." *Giboney*, 336 U.S. at 491-492. This Court observed there that, "it has never been deemed an abridgement

of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.*, at 502. Also, in *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), this Court affirmed the constitutionality of a federal law that permitted a householder to require that a mailer remove his name from mailing lists and stop all future mailings to the householder. *Rowan*, 397 U.S. at 729-740. The Court "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another" and held that "no one has a right to press even 'good' ideas on an unwilling recipient." *Id.*, at 738.

The Texas telephone harassment statute erects a legal barrier to the use of the telephone as a weapon by a harasser. It defends the right of telephone users and owners to the intended use of their telephones. And it provides a valuable and important tool to law enforcement and victims in the continuing and ongoing fight against domestic violence and other similar kinds of abuse. It does not invade First Amendment rights.

V. Similar telephone harassment statutes affirmed

In *Gormley v. Director, Connecticut State Dep't of Adult Probation*, 449 U.S. 1023 (1980), this Court denied certiorari in a case where the Second Circuit

Court of Appeals found that the Connecticut telephone harassment statute was not unconstitutionally overbroad on its face. *See Gormley v. Director, Connecticut State Dep't of Adult Probation*, 632 F.2d 938 (2nd Cir. 1980). The statute at issue there was very similar to the Texas statute at issue in this case.[1] *See Gormley*, 632 F.2d at 940 n.1. Justice White dissented to the denial of certiorari in that case and pointed out that several state courts had addressed similar statutes and reached conflicting results on the question of their overbreadth. *Gormley*, 449 U.S. at 1025. Justice White argued that, "even if the Court is of the view that the judgment below is correct, there is sufficient reason to grant certiorari and issue a judgment to this effect." *Id.*

Since then, the Supreme Court of West Virginia, in *State v. Thorne*, 333 S.E.2d 817 (1985), has upheld a similar statute.[2] In that case, the Court explained, "Prohibiting harassment is not prohibiting speech, because harassment is not a protected speech." *Id.*, at

---

[1] The Connecticut statute at issue there provided, "A person is guilty of harassment when (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." CONN. GEN. STAT. § 53a-183(a)(3) (Rev 1958, Supp. 1979)

[2] The statute at issue there provided "It shall be unlawful for any person with intent to harass or abuse another by means of telephone to: . make repeated telephone calls, during which conversation ensues, with intent to harass any person at the called number. . " WEST VIRGINIA CODE § 61-8-16(a)(4) (1984)

819. The Court also concluded, "[h]arassment is not communication, although it may take the form of speech." *Id.* And this Court denied review of that decision. *Thorne v. West Virginia*, 474 U.S. 996 (1985).

After this Court denied certiorari in *State v. Thorne*, the United States Fourth Circuit Court of Appeals reviewed the same case on appeal from the denial of federal habeas relief in federal district court and expressly "agree[d] with the plurality opinion of the Supreme Court of Appeals of West Virginia and with the district court that [the statute at issue there] prohibit[ed] conduct and not protected speech." *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988). Once again, this Court denied certiorari. *Thorne v. Bailey*, 488 U.S. 984 (1988).

The Supreme Court of Pennsylvania, in *Pennsylvania v. Hendrickson*, 724 A.2d 315 (1999), has also upheld a similar statute.[3] The defendant in that case argued that the statute was overbroad and facially unconstitutional. *Hendrickson*, at 317. But the Court found that "the plain language" of the statute sought "to regulate conduct intended to harass another," that

---

[3] The statute at issue there provided that a person committed an offense if "with intent to harass another, he . . . (1) ma[de] a telephone call without intent of legitimate communication or address[ed] to or about such other person any lewd, lascivious or indecent words or language or anonymously telephone[d] another person repeatedly; or (2) ma[de] repeated communications anonymously or at extremely inconvenient hours or in offensively coarse language." 18 PA. C.S. § 5504(a)(1) and (a)(2).

it "focuse[d] on the manner and means of communication," that it was "not directed at the content of speech" and that it was "unrelated to the suppression of free expression." *Id.*, at 318.

The Supreme Court of Connecticut also found that a mail harassment statute, with very similar elements to the telephone harassment statute at issue in this case, was not overbroad in violation of the First Amendment. *State v. Murphy*, 757 A.2d 1125 (Conn. 2000). The statute at issue in that case prohibited communicating "with a person by telegraph or mail," if the accused did so "with intent to harass, annoy or alarm another person," and he communicated with the person by telegraph or mail, "in a manner likely to cause annoyance or alarm. . . ." *Id.*, at 1128 n.1. The Court found that the statute proscribed harassing conduct and did not "seek to regulate the content of communications made by mail." *Id.*, at 1131.

The United States also has a law that is similar to the statute at issue in this case. Section 223(a) of the Communications Decency Act currently provides that,

> (a) . . . Whoever –
>
> (1) in interstate or foreign communications –
>
> * * *
>
> (C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without

> disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;
>
> (D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or
>
> (E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication . . . shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

47 U.S.C. § 223(a)(1)(C), (D), & (E).

This Court has previously addressed the constitutionality of some specific former provisions of section 223. *See Reno v. ACLU*, 521 U.S. 844 (1997) (deciding that provisions of the act that prohibit knowing transmission to minors of "indecent" or certain "patently offensive" communications abridge the right to free speech, and severing "the term 'or indecent' from the statute, leaving the rest of § 223(a) standing," but holding that, "[i]n no other respect, . . .

can § 223(a) or § 223(d) be saved by textual surgery.") (the affected sections appear to have been amended since this Court's decision); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (deciding that section 223(b)'s ban on indecent telephone messages violated the First Amendment) (the affected section appears to have been amended since this Court's decision). But this Court does not appear yet to have addressed the constitutionality of the parts of section 223 that are similar to the Texas telephone harassment statute.

A few circuit courts that have addressed the constitutionality of 47 U.S.C. § 223 have upheld those parts that are similar to the Texas telephone harassment statute against claims that the federal statute was vague and overbroad. *See United States v. Bowker*, 372 F.3d 365 (6th Cir. 2004) (rejecting "Bowker's argument as to the purported overbreadth of the telephone harassment statute, 47 U.S.C. § 223(a)(1)(C)," and deciding that his "vagueness challenge [also] fails."); *and see United States v. Eckhardt*, 466 F.3d 938 (11th Cir. 2006) (agreeing "with *Bowker* that § 223(a)(1)(C) is not overbroad," and deciding that it also "is not void for vagueness."). But one circuit court determined that, as applied to the facts in the case before it, a part of section 223 that is similar to the Texas statute was unconstitutional. *See United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999) (deciding that 47 U.S.C. § 223(a)(1)(C) was unconstitutional as applied to Popa but not addressing his claim that the statute was overbroad on its face).

Overall, the clear trend of American case-law – addressing facial vagueness and overbreadth claims against statutes similar to the Texas telephone harassment statute – suggests that the Texas statute is constitutional. There is no doubt that if this Court were to weigh in on the question of the facial constitutionality of the Texas telephone harassment statute, the bench and bar would benefit. However, the trend suggests that this Court should not grant certiorari in this case, unless it intends to affirm the judgment of the Texas Court of Criminal Appeals.

VI. The telephone harassment statute is not vague and it does not implicate First Amendment freedoms

A. Statute is not vague

In his brief, Petitioner contends that he was "accused of making repeated phone calls to his ex-wife . . . that offended ***her***." (Pet.Br: 3) (emphasis added). He also argues, "the statute does not define an objective standard in which to measure to what level of annoyance or alarm is prohibited." (Pet.Br: 13). These statements are factually inaccurate in a constitutionally significant way. A former version of Texas' harassment statute required proof that the actual victim of the crime was offended. That former version of the statute was declared unconstitutionally vague by the United States Court of Appeals for the Fifth Circuit in *Kramer v. Price* for, among other reasons, failing to apply a "reasonable" person standard. *See Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983),

reh'g en banc granted, 716 F.2d 284 (5th Cir. 1983), *grant of relief aff'd*, 723 F.2d 1164 (5th Cir. 1984) (explaining that the former version of Texas' harassment statute, which required proof that the accused "annoy[] or alarm[] ***the recipient***," made "no attempt at all to specify whose sensitivity must be offended," and finding that the statute was "unconstitutionally vague" because, among other reasons, "the standard of conduct it specifie[d] [wa]s dependent on each complainant's sensitivity"; and observing that, "Texas courts have refused to construe the statute to indicate whose sensibilities must be offended"). Also, after *Kramer*, the Texas Court of Criminal Appeals found a former version of Texas' stalking offense to be unconstitutional for, among other reasons, the same kind of flaw. *See Long v. State*, 931 S.W.2d 285, 289 (Tex. Crim. App. 1996) (observing that, "[t]he stalking subsection [contained] a requirement that the conduct be 'specifically directed' toward a particular person," and that, "the subsection also contains the words 'that person,' which appear to specify the perspective as being that of the complainant rather than that of a reasonable person.").

But the Texas Legislature has, since then, amended the Texas telephone harassment statute to cure the infirmity that was found by the Fifth Circuit in *Kramer* and similarly identified by the Texas Court of Criminal Appeals in *Long*. The current version of the statute, under which Petitioner was charged in this case, requires proof that the conduct be undertaken "in a manner reasonably likely to harass, annoy . . . another." TEX. PEN. CODE ANN. § 42.07(a)(4)

(Vernon 2003). And, in this case, the Texas Court of Criminal Appeals specifically construed the text of the statute under which Petitioner was charged to require proof that "the actor make . . . telephone calls in a manner reasonably likely to harass, annoy . . . an ***average person***." *Scott*, 322 S.W.3d at 669 (emphasis added). Therefore, the State submits that this Court should reject Petitioner's contention that he was "accused of making repeated phone calls to his ex-wife . . . that offended *her*." (Pet.Br: 3) (emphasis added).

Petitioner also claims that the terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and "offend," in the statute are "inherently vague." (Pet.Br: 11-15). The State disagrees. As the Texas Court of Criminal Appeals observed on discretionary review in this case, the terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and "offend," all have definitions that are "commonly understood" and that can be found in the dictionary. *See Scott*, 322 S.W.3d at 669 n.13, quoting from *Webster's Ninth New Collegiate Dictionary* 47, 68, 88, 405, 552, 819 and 1245 (1988).

The term "annoy" in the Texas statute is also not used as that term was used in the statute struck down by this Court in *Coates v. Cincinnati*, 402 U.S. 611 (1971). In *Coates*, this Court found unconstitutional on its face an ordinance prohibiting "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by. . . ." *Coates*, 402 U.S. at

611-612. In that case this Court observed, "The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people." *Id.*, at 615.

The Texas statute at issue here does not prohibit assembly and association in the public square like the statute at issue in *Coates*. The Texas statute instead only prohibits repeated impositions upon the privacy of another through the use of a telephone with intent to annoy, and in a manner reasonably likely to annoy. The Texas statute also, as explained earlier and in contrast to the statute at issue in *Coates*, does not require the level of annoyance necessary to constitute a violation to be measured by the sensibilities of each individual potential victim of the offense; instead, only conduct engaged-in "in a manner reasonably likely to . . . annoy . . . ***an average person***" can constitute an offense. *See Scott*, 322 S.W.3d at 669 (emphasis added).

Furthermore, any potential vagueness existing in the terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and/or "offend," is avoided by the resort to the canon of *noscitur a sociis*. In *Williams*, this Court observed that, "the commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated. *Williams*, 553 U.S. at 294-295 (finding that, "'[p]romotes,' in a list that includes 'solicits,' 'distributes,' and 'advertises,' is most sensibly read to mean the act of recommending purported

child pornography to another person for his acquisition."). Similarly, the meanings of each of the words challenged by Petitioner in the Texas statute are narrowed and focused by the other words with which they are associated. *See* TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003).

Petitioner also contends that the term "repeated" in the statute is too vague to be enforced consistently with the Constitution. But contrary to Petitioner's contention, the term "repeated" as used in the Texas statute is not vague. (Pet.Br: 15-16). The Texas Court of Criminal Appeals found, as it did for the other challenged terms, that the term "repeated" has a "commonly understood" meaning and a definition that can be found in the dictionary. *See Scott*, 322 S.W.3d at 669 n.12, quoting from *Webster's Ninth New Collegiate Dictionary* 998 (1988). That Court also narrowly construed the term "repeated" as used in the statute to mean "more than one telephone call in close enough proximity to properly be termed a single episode." *See Scott*, 322 S.W.3d at 669 n.12. And a careful examination of the text of the statute reveals that the term "repeated" is already limited and narrowed by the phrase "in a manner reasonably likely to harass, annoy . . . another." *See* TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) (providing that a person commits an offense if he "makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy . . . another.").

Finally, this Court "has recognized that a scienter requirement may mitigate a law's vagueness,

especially with respect to the adequacy of notice . . . that [the] conduct is proscribed." *Village of Hoffman Estates v. Flipside Hoffman*, 455 U.S. 489, 499 (1982). The statute at issue in this case contains an overriding specific intent requirement that ensures that a person falling within its prohibitions cannot do so without knowing that he would do so in advance. *See* TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) (conditioning liability for a violation of the statute on the availability of evidence showing that the suspect acted "with intent to harass, annoy . . . another."). As Judge Johnson explained in her concurrence to the majority opinion below, "the speaker who intends to harass, annoy . . . another has himself defined, for that purpose . . . the applicable term. . . ." *Scott*, 322 S.W.3d at 671 (Johnson, J., concurring). Thus, for yet another reason, it is evident that Texas' telephone harassment statute is not vague.

B. Statute does not implicate the First Amendment

The statute also does not implicate the First Amendment. As the Texas Court of Criminal Appeals explained, "[t]he statutory subsection, by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress." *Scott*, 322 S.W.3d at 669-670. The Court further explained that, "to the extent that the statutory subsection is susceptible of application to

communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id.*, at 670.

This is not a case like that addressed in this Court's recent opinion styled *Snyder v. Phelps*, 09-751, 562 U.S. ___ (March 2, 2011) (not yet reported). First, while this case presents a facial attack on a statute, *Snyder* was clearly an as-applied challenge. *See Snyder*, Slip op. at 14 (explaining, "the reach of our opinion here is limited to the particular facts of this case."). Second, the "communication" at issue in this case was transmitted through a telephone, from one person to a singular other person. In contrast, the speech at issue in *Snyder* was conducted "at a public place adjacent to a public street. . . . the archetype of a traditional public forum. . . ." *Snyder*, Slip op. at 10. And third, *Snyder* turned on the conclusion that the speech there was on a matter of "public concern." *See Snyder*, Slip op. at 10. There is little chance that harassing telephone calls will be directed at matters of public concern, but if a charge is ever brought where the argument can be made that the communications related to a matter of public concern, then the rights of the accused would be adequately protected by resort to an as-applied challenge.

Petitioner argues that the statute is "not a time, place, and manner restriction because it is not a

'viewpoint neutral' restriction." (Pet.Br: 27). He is clearly wrong on the issue of the viewpoint neutrality of the Texas statute. The statute at issue here is entirely viewpoint neutral.

While there is no denying that the Texas harassment statute contains the word "communication," it – like the statute at issue in *Hill v. Colorado*, 530 U.S. 703 (2000) – makes no distinction based on the content of the "communication" involved. The Texas statute applies whether the communication involved is a political message or a threat of death, whether it is "pro-Obama" or "anti-Health Care," whether it religious or atheistic, and whether it is a pledge of love or a statement of hate. Therefore, the Texas telephone harassment statute is content-neutral.

The Court of Criminal Appeals' conclusion that the First Amendment is not implicated by the telephone harassment statute is supported by this Court's observations in *Hill* that there is a "recognizable privacy interest in avoiding unwanted communication," that "the unwilling listener[ ] [has an] interest in avoiding unwanted communication," and that the interest in avoiding unwanted communication has been identified as "an aspect of the broader 'right to be let alone.'" *Hill*, 530 U.S. at 716. In *Hill*, the Court also observed that "the right to avoid unwelcome speech has special force in the privacy of the home, [citation omitted], and its immediate surroundings, [citation omitted], but can also be protected in confrontational settings. *Hill*, 530 U.S. at 717.

The State recognizes that, because of recent developments in technology, telephones are no longer only found inside homes; but the State suggests that telephones are still considered by many people to be somewhat of an extension of that home environment. In very real ways, telephones are treated as an extension of ourselves. Telephones are uniquely personal devices through which people communicate and receive desired communications – person to person.[4]

While a telephone is not necessarily always a "confrontational setting," the types of communications and other behaviors that are prohibited by the Texas telephone harassment statute are certainly confrontational. They must, after all, be made repeatedly with an intent to, and in a manner likely to, harass, annoy, alarm, abuse, torment or embarrass, another. That type of activity is inherently confrontational.

To use telephones as they are intended to be used, people must remain open to contact by others; thus, they become vulnerable to attack by others whose desire is anything but consistent with the intended purpose of those devices. A victim's ownership or possession of such a device can be used to inflict harassment upon them. But the Texas statute regulates interference with such devices that might cause people to unplug the phone altogether. In a

---

[4] In a different context, this Court has recognized that a person has a valid privacy interest in the content of their telephone communications. *See Katz v. United States*, 389 U.S 347, 353 (1967).

very real sense, the Texas statute protects telephone owners' and users' First Amendment rights by freeing telephones from the types of harassing conduct that interferes with their intended use. And the Texas statute does so without regard to the content of any communications that are used (if any actual communications are used) to cause such interference.

Unlike a radio show or a television program, one cannot simply change the station when one is subjected to a message he or she does not want to hear. Unlike a comedy show with a stand-up comic, one cannot simply get up and leave the theater. To turn off one's phone, one must also sacrifice an enormous amount of potential communication and communication availability that one might legitimately desire through those mediums.

The First Amendment does not protect against narrowly tailored statutes, such as the one at issue here, that prohibit repeatedly engaging in conduct toward another with the intent to cause an unpleasant emotional reaction in the other – including fear, annoyance, alarm, offense, torment, abuse, or embarrassment – in a manner reasonably likely to bring about those emotional responses in an average person. *See Hill*, 530 U.S. at 724 (upholding a statute which sought "to protect those who enter[ed] a health care facility from . . . harassment, . . . nuisance, . . . persistent importuning, . . . following, . . . dogging, and . . . implied threat of physical touching."). The privacy interest in avoiding unwanted communications identified in *Hill* is implicated by that kind of conduct. *See Hill*, 530 U.S. at 716.

The Texas statute is narrowly tailored to protect the interest in avoiding repeated harassing, annoying, alarming, abusive, tormenting, embarrassing and offensive telephone communications that are made in a manner reasonably likely to achieve those responses. *Id.* The statute protects and defends the broader "right to be let alone" of persons who make use of telephones. *Id.* Although the First Amendment certainly protects the right to speak -- even messages that are sometimes deemed offensive – that right does "not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Hill*, 120 U.S. at 2489, *citing Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (upholding a general ban on residential picketing).

Petitioner argues that a "phone . . . can simply be turned off." (Pet.Br: 29). But that is not an adequate option. While it certainly is a response that would prevent a victim of telephone harassment from some continuing negative effects of telephone harassment, that response fails to address other sometimes more important concerns. The owner or user of a telephone will possess such a device for at least two reasons: (1) to be able to communicate with others, and (2) to be available to receive communications from others. If the telephone is "turned off" in response to harassment, or if the receipt of wanted calls and messages are delayed because of the actions of a harasser, the rights of the telephone owner have been infringed in an essentially intolerable way. No longer can the telephone user make a call – if the desire so strikes him or her – without fear of being subjected to further

harassment. No longer can the telephone user stay connected to friends and acquaintances who might otherwise be capable of providing needed or desired information about events and circumstances relevant to the life of the phone user. So for at least those reasons and possibly for other reasons as well, Petitioner's suggestion that a phone be turned off is not a valid option.

CONCLUSION

Samuel Scott's petition for writ of certiorari should be denied. Or, in the alternative, should this Court decide to grant certiorari in this case, it should be granted only so that this Court can affirm the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

SUSAN D. REED
Criminal District Attorney
BEXAR COUNTY, TEXAS

KEVIN PATRICK YEARY*
Assistant Criminal District Attorney
BEXAR COUNTY, TEXAS
PAUL ELIZONDO TOWER
300 Dolorosa, Suite 370
San Antonio, Texas 78205-3030
Telephone No. (210) 335-2734
State Bar No. 22149500
Email: kyeary@bexar.org

Attorneys for the State of Texas

**Attorney of Record*
Representing the State of Texas

184

No. 10-884

Supreme Court, U.S.
FILED
MAR 22 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SAMUEL SCOTT,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITIONER'S REPLY BRIEF

DONALD H. FLANARY III.*
GOLDSTEIN, GOLDSTEIN & HILLEY
310 South St. Mary's Street,
Suite 2900
San Antonio, Texas 78205
210-226-1463
210-226-8367 facsimile
donflanary@hotmail.com

CHAD P. VAN BRUNT,
Attorney and Counselor

**Attorney of Record*
Representing Samuel Scott

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad.

2. Whether the Texas harassment statute violates the First Amendment because it is a content-based restriction on speech and expressive conduct.

3. Whether private argumentative speech should be a protected class of speech.

4. Whether the First Amendment requires an analysis of the distinctions between open-air, face-to-face communication and electronic communication.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

ARGUMENT 2

I. Petitioner Has Properly Preserved The Second, Third, And Fourth Questions Presented 2

II. First Amendment Jurisprudence Controlling This Case Is Unsettled 5

A. Vagueness 7

B. Overbreadth 8

III. The Statute Implicates First Amendment Speech And Does Not Constitute A Solution To The Problems Facing This Area Of The Law 11

IV. The Distinction Between Electronic Communication And Telephone Communication 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Robertson, 520 U.S. 83 (1997) 2

Aptheker v. Sec'y of State, 378 U.S. 500 (1964) 8

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 8, 11

Coates v. Cincinnati, 402 U.S. 611 (1971) 7

Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727 (1996) 6

Hill v. Colorado, 530 U.S. 703 (2000) 6, 10

Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 6

Kramer v. Price, 712 F.2d 174 (5th Cir. 1983) 10

Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996) 4, 5, 11

New York v. Ferber, 548 U.S. 747 (1982) 8

People v. Klick, 362 N.E.2d 329 (Ill. 1977) 9

Provo City v. Whatcott, 1 P.3d 1113 (Ut. 2000) 9

Scott v. State, 322 S.W.3d 662 (Tex. Crim. App. 2010) 3, 12, 13

State v. Blair, 601 P.2d 766 (1979) 7, 8

State v. Brobst, 857 A.2d 1253 (N.H. 2004) 9

State v. Dronso, 279 N.W.2d 710 (Wis. 1979) 9

State v. Schwebke, 644 N.W.2d 666 (Wis. 2002) 7

TABLE OF AUTHORITIES – Continued

Page

United States v. National Dairy Products Corp., 372 U.S. 29 (1963) 8

United States v. Raines, 362 U.S. 17 (1960) 10

United States v. Reese, 92 U.S. 214 (1875) 10

United States v. Williams, 553 U.S. 285 (2008) 6, 7, 9

Yee v. City of Escondido, 503 U.S. 519 (1992) 2, 5

OTHER AUTHORITIES

U.S. Const. amend. I 4, 6, 11, 12

Tex. Penal Code §42.07 ..... *passim*

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010). The opinion of the Court of Appeals of Texas, Fourth District, at San Antonio is reported at *Scott v. State*, 298 S.W.3d 264 (Tex. App. – San Antonio 2009).

JURISDICTION

The date on which the highest state court decided Petitioner's case was October 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATEMENT

The Petitioner now responds to the following arguments presented by the Respondent:

1. That the Petitioner has not properly preserved the second, third, and fourth questions presented.

2. That First Amendment jurisprudence controlling this case is not unsettled.

3. That similar harassment statutes have been affirmed.

4. That the Texas harassment statute is not vague and it does not implicate the First Amendment.

5. That this is not an "electronic communications" harassment case.

ARGUMENT

I. Petitioner Has Properly Preserved The Second, Third, And Fourth Questions Presented.

Respondent contends that Petitioner failed to properly invoke this Court's jurisdiction as required by 28 U.S.C. §1257(a) concerning the second, third, and fourth questions presented. (Res.Br. 7-8). This argument ignores the substance of the arguments in the prior filings of Petitioner and the prior proceedings in the Texas Courts and looks instead to the formality of labeling a particular argument a "question presented" as the only means to show that it " . . . was either addressed by, or properly presented to, the state court that rendered the decision. . . ." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). This understanding of 28 U.S.C. §1257(a) is not supported by this Court's rulings. *See id.* (setting out different formulations of the requirements necessary to preserve a federal claim). Moreover, "[a] litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

In regard to the second question presented, Petitioner has clearly raised this issue. While the specific statement used in the second question presented has not been previously listed in Petitioner's prior filings as a "question presented," it has clearly been germane to the underlying proceedings and can be found thoroughly briefed and set out in boldface type in the headings of both Petitioner's appeal to the Court of Appeals, Fourth District, at San Antonio and in Petitioner's brief in response to Respondent's Petition for discretionary review to the Texas Court of Criminal Appeals. *See* (Pet.Br.App. 135). This argument is inextricably intertwined with the first question presented because a major issue throughout this case is whether the Texas harassment statute implicates the First Amendment thus allowing Petitioner to make a facial challenge for vagueness and overbreadth. One way of showing that the statute involves speech is by arguing that it regulates the content of speech as Petitioner has consistently done. This issue was also addressed by the lower court's opinion. *See Scott v. State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010).

In regard to the third and fourth questions presented, these formulations have grown out of the prior proceedings and, in many ways, are reactionary to the erroneous ruling of the Texas Court of Criminal Appeals. The issue of private argumentative speech is a creative formulation of what has been ultimately at issue within the vagueness and overbreadth challenge. It refers to expression that by nature is

confrontational and thus annoying or harassing at times, but is nonetheless vital communication that is at the heart of the protections provided by the First Amendment. This is a label for a region of speech that Petitioner contends is beyond the legitimate sweep of the Texas harassment statute but nevertheless is included as conduct prohibited by the statute. This has clearly been an issue in this case because both the Respondent and the Texas Court of Criminal Appeals have previously argued and ruled that communication made with the specific intent to annoy, harass, alarm, etc. is not speech, let alone protected speech.

Finally, the issue of whether the First Amendment requires analysis of the distinctions between open-air, face-to-face communication and electronic communication is in essence a response to the Texas Court of Criminal Appeals ruling in this case as compared to its own prior ruling in *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996). As previously argued, the most significant distinction between the prior overruled Texas statute in *Long* and the one before this Court, is that the latter deals only with different forms of electronic communications, be it by telephone or some other electronic device, as compared to communication between people in their immediate presence. It is a question presented to this Court because Petitioner believes that this is a significant issue at hand concerning the larger issue of First Amendment jurisprudence within the context of rapidly changing communication technology. This

argument has essentially been brought throughout the proceedings by citing *Long* for the proposition that the current statute at issue should be overruled for the same reasons as the statute in that case.

Alternatively, there is no contention by Respondent that the first question presented for review by Petitioner was not preserved. The latter three questions presented are cognizable by this Court as subsidiary arguments that are fairly included in support of the first. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534 (1992). For the same reasons that Petitioner contends that these issues have been properly presented, they are also clearly related and supportive arguments to Petitioner's first question presented. Should the court decide that these issues were not clearly presented and thus not ripe for review as individual questions presented, Petitioner asserts that the issues listed under REASONS FOR GRANTING REVIEW in his Petition for Writ of Certiorari are all supportive arguments in favor of Petitioner's first question presented as well. *See* (Pet.Br. 4-30).

II. First Amendment Jurisprudence Controlling This Case Is Unsettled.

The Respondent disagrees with the assertion that the law concerning speech transmitted *via* telephone or wire is unsettled, yet, through the words

of their own argument, they bring before the Court the very reasons why clarity in this area is so desperately needed. (Res.Br. 12). Without question this Court has discussed at length the important interaction between the concepts of vagueness and overbreadth. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000) (stating that a statute is impermissibly void if it proves unreasonably difficult for a person of ordinary intelligence to understand what conduct the statute prohibits or "if it authorizes or even encourages arbitrary and discriminatory enforcement" (citing *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999))); *United States v. Williams*, 553 U.S. 285, 304 (2008) (discussing the "relaxed" requirements applied by the Court to overly-broad statutes regulating speech). Nevertheless, the careful foundation created to guarantee the protections of the First Amendment requires careful scrutiny to meet the needs of a society constantly developing new methods of expression. *See Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 777-778 (1996) (acknowledging the ever-changing world of communications as an important factor in interpreting the First Amendment); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698 (1992) ("We have allowed flexibility in our doctrine to meet changing technologies in other areas of constitutional interpretation.") (O'Connor, J., concurring) (citations omitted).

A. Vagueness

The truly unsettled issue, in terms of vagueness, boils down to a crisis of categorization. For example, faced with a telephone harassment law similar to Texas' §42.07, the Supreme Court of Oregon concluded that the contested statutory language failed to adequately define the extent and the type of conduct it sought to prohibit. *State v. Blair*, 601 P.2d 766, 769, 287 Or. 519, 524-525 (1979). The statute targeted the *communication* rather than the specific injury inflicted upon the victim in any given case. *Id.* at 768. In another example, while addressing a disorderly conduct statute focused upon analogous speech-based harassment, the Wisconsin Supreme Court stressed that their decision to uphold the statute over a vagueness challenge was predicated upon the efficacy of the law in providing notice to the defendant that certain types of *conduct* rather than speech were prohibited. *See State v. Schwebke*, 644 N.W.2d 666, 680, 253 Wis. 2d 1, 29 (Wis. 2002). The Texas harassment statute, in contrast, does not provide any form of dependable conduct-based notice. *United States v. Williams*, 553 U.S. 285, 306 (2008) (explaining that vague statutes fail by virtue of the "indeterminacy" of what facts the state must prove; rejecting "conduct [that] was 'annoying' or 'indecent' as wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings" (citing *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971))); (Pet.Br. 13). The Respondent attempts to under emphasize just how vague the Texas statute truly is.

Instead of regulating merely telephone calls, Section 42.07 targets any kind of electronically expressed communication. Tex. Penal Code §42.07. To suggest that the law is settled concerning criminal provisions where conduct must, by virtue of the statutory wording, be interpreted on a case-by-case basis is to enter the realm of physical impossibility. *See generally Aptheker v. Sec'y of State*, 378 U.S. 500, 516 (1964) (disfavoring a case-by-case approach in efforts to "probe" a statute for an inkling of constitutionality); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 33 (1963) ("This is not to say that a beadsight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage."); *Blair*, 601 P.2d at 768 (concerned with the potential for vague laws to allow a jury to determine what conduct the law was intended to proscribe).

B. Overbreadth

This Court has long recognized the dangers engrained in overly-broad laws which extend well past their intended scope. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (prioritizing the more compelling interest of preventing the chilling of legitimate speech at the hands of an overly-broad statute); *New York v. Ferber*, 548 U.S. 747, 768 (1982) (stating that citizens might "refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression"). The Court has phrased this argument in terms of a

"relaxed" vagueness challenge, allowing a defendant to assert that a statute is facially invalid in its scope regardless of the conduct specifically charged. *Williams,* 533 U.S. at 304.

The Respondent contends that the questions presented to the Court in this case require a degree of imaginative speculation failing to rise to the level of substantial overbreadth. (Res.Br. 15-16). To apply the Respondent's argument to the types of violations addressed in the Petitioner's petition would be to vitiate the very essence of the overbreadth challenge. No other conceivable method exists to test such a statute than by testing its plain wording against varied forms of protected speech. The Utah Court of Appeals recognized this fact when scrutinizing a telephone harassment law similar in many respects to §42.07. *Provo City v. Whatcott*, 1 P.3d 1113, 1115-1116 (Ut. 2000). That court considered many different legitimate hypothetical situations from the frequent phone calls of a worried mother to a lewd practical joke. *Id.* ("The potential overbreadth of the statute is not, of course, limited to the scenarios posed above."); *see also State v. Dronso*, 279 N.W.2d 710, 117 (Wis. 1979) (taking into consideration the possibility of legitimate needs to make annoying calls). Ultimately, the Utah Court of Appeals held the statute invalid. *Id.* at 1116. The Supreme Court of New Hampshire also relied upon possible applications of the statute in its decision to strike down New Hampshire's own harassment law. *See State v. Brobst*, 857 A.2d 1253, 1256 (N.H. 2004) (citing *People v. Klick*, 362 N.E.2d

329, 330 (Ill. 1977) (finding that the prohibition of all calls made with an intent to alarm jeopardized too many forms of protected speech)). Inquiries of this nature do not constitute "hypertechnical theories," but merely examine whether a statute is valid in the "vast majority" of cases. *Hill v. Colorado*, 530 U.S. 703, 733 (2000); (Res.Br. 16). When §42.07 receives this same degree of scrutiny, it becomes clear that the Texas statute is more than a mere barrier to "the use of the telephone as a weapon by a harasser"; it has the power to discourage many legitimate uses of communication entirely. (Res.Br. 19).

The Respondent attempts to minimize the scope of the Texas harassment statute by asking this Court to only consider the law in the light of its "real life" applications. (Res.Br. 17). Unfortunately, jurors and judges alike do not possess a dowsing rod to assist them in determining exactly what conduct constitutes a "real life" scenario envisioned by the statute. *See generally Kramer v. Price,* 712 F.2d 174, 178 (5th Cir. 1983) ("By failing to provide reasonably clear guidelines, [the statute] gives officials unbounded discretion to apply the law selectively and subjects the exercise of the right to speech to an unascertainable standard."). This is the purpose of allowing a facial challenge for overbreadth. *United States v. Raines*, 362 U.S. 17, 22-23 (1960) (citing *United States v. Reese*, 92 U.S. 214, 219-220 (1875)). Trusting the State to determine when and how its harassment statute should operate most certainly has the potential to chill legitimate speech. An overbreadth challenge

constitutes "strong medicine," Texas' current law demands nothing less. *Broadrick*, 413 U.S. at 613.

III. The Statute Implicates First Amendment Speech And Does Not Constitute A Solution To The Problems Facing This Area Of The Law.

The Respondent might contend that the prohibition of argumentative speech conducted by electronic means constitutes nothing more than a mere manner and means prohibition; however, it is difficult to conceptualize how one statute prohibiting harassing speech in general is unconstitutional while the one at issue is applied only to different forms of harassing speech *via* electronic expression is not. *See generally Long*, 931 S.W.2d at 288 (discussing the invalid Texas "stalking" statute). The discrepancy in the Texas cases alone, not to mention the complete lack of clarity in courts nationwide, beg the Court for clarification.

Moreover, the Texas Court of Criminal Appeals has virtually rewritten §42.07(a)(4) in its attempt to "narrowly construe" the statute to avoid First Amendment implications. Compare the statute as written:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment or embarrass another, he:
>
> * * *
>
> (4) makes repeated telephone communications . . . in a manner reasonably likely

> to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Tex. Penal Code §42.07(a)(4), with the formulation by the Texas Court of Criminal Appeals:

> The statutory subsection, by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress.

Scott, 322 S.W.3d at 669-670. This formulation required more than just a plain text interpretation. The Texas Court of Criminal Appeals has gone as far as to create a narrowing construction of the statute that virtually rewrites it. Certiorari should be granted in this case to clarify this important matter.

IV. The Distinction Between Electronic Communication And Telephone Communication.

The Respondent argues that the Texas Court of Criminal Appeals rightly determined that this case involves only a subsection of the Texas harassment statute dealing with strictly telephone communication. *See* (Res.Br. 9-12). This is an attempt to avoid the many examples of possible First Amendment violations provided by Petitioner to show the overly-broad language of the Texas harassment statute. Not only does this avoidance give more credence to Petitioner's argument, it also calls into question the

vagueness of the term "telephone communication" altogether.

Both the Texas Court of Criminal Appeals and the Respondent reason that because of the private nature of the telephone, the statute at hand does not criminalize protected speech but only regulates against the invasion of one's privacy. *See* (Res.Br. 32-36), *Scott*, 322 S.W.3d at 669-670 (Tex. Crim. App. 2010). This privacy interest is exaggerated and does not override a citizen's right to free speech. The Respondent contends that the only option for a telephone user to avoid unwanted calls is to turn the telephone off. (Res.Br. 35). This argument ignores modern technology and the changing nature of modern communication including the many new features that are found in current cellular and "smart" phones.

Telephones are not simply rotary phones tethered to an electrical cord that are kept exclusively in one's home. Instead, the modern telephone comes in many forms. Telephones today, (whether landline or cellular) have call blocking features, caller ID, and many other privacy features. It is a long way away from the times of the trapped telephone user who must cut themselves off from the world to avoid a call they would not want to hear.

The distinction between telephone and electronic communication has become meaningless. Modern telephones can access the internet, send instant messages, access social networking sites, stream live video and radio, send text messages, access voice

mails stored on remote servers (as in this case where the voice messages were sent to a cell phone). Therefore, the case at hand implicates the "electronic communications" provision of the statute. Thus the Respondent's need to show a distinction as to what provision of the Texas harassment statute Petitioner was charged under not only fails to avoid examples of protected speech the statute potentially criminalizes, it also promotes Petitioner's argument that the statute is vague as there is no longer a distinction between telephone and electronic communication.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DONALD H. FLANARY III.*
GOLDSTEIN, GOLDSTEIN & HILLEY
310 South St. Mary's Street,
Suite 2900
San Antonio, Texas 78205
210-226-1463
210-226-8367 facsimile
donflanary@hotmail.com

CHAD P. VAN BRUNT,
Attorney and Counselor

*Attorney of Record
Representing Samuel Scott*